(9)

No. 03-1039
Title: Jill L. Brown, Acting Warden, Petitioner
v.
William Charles Payton
Docketed: January 22, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-99000, 00-99003)
Decision Date: October 20, 2003
Questions Presented

Date	Proceedings and Orders
Jan 15 2004	Petition for a writ of certiorari filed. (Response due February 23, 2004)
Feb 17 2004	Order extending time to file response to petition to and including March 24, 2004.
Mar 24 2004	Brief of respondent William Charles Payton in opposition filed.
Mar 24 2004	Motion for leave to proceed in forma pauperis filed by respondent.
Apr 1 2004	Reply of petitioner Thomas Goughnour, Acting Warden filed.
Apr 7 2004	DISTRIBUTED for Conference of April 23, 2004.
Apr 26 2004	DISTRIBUTED for Conference of April 30, 2004.
May 10 2004	DISTRIBUTED for Conference of May 13, 2004.
May 17 2004	DISTRIBUTED for Conference of May 20, 2004.
May 24 2004	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 24 2004	Petition GRANTED.
Jun 8 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 6, 2004.
Jul 19 2004	Extension of time within which to file the respondent's brief on the merits to and including September 17, 2004.
Aug 6 2004	Joint appendix filed.
Aug 6 2004	Brief of petitioner Jill L. Brown, Acting Warden filed.
Aug 6 2004	Motion for leave to file amicus brief filed by Criminal Justice Legal Foundation.
Aug 19 2004	CIRCULATED.
Sep 1 2004	SET FOR ARGUMENT Wednesday, November 10, 2004.
Sep 1 2004	Further extension of time within which to file respondent's brief on the merits to and including September 27, 2004.
Sep 27 2004	Brief of respondent William Charles Payton filed.
Sep 28 2004	Motion for leave to file amicus brief filed by Criminal Justice Legal Foundation GRANTED.
Sep 30 2004	Record received from U.S.C.A. - 9th Circuit. (1 envelope)
Oct 7 2004	Record received from U.S.D.C. - Central Dist. of California (5 boxes)
Oct 28 2004	Reply of petitioner Jill L. Brown, Acting Warden filed. (Distributed)
Nov 10 2004	Argued. For petitoner: Andrea N. Cortina, Deputy Attorney General, San Diego, Cal. For respondents: Dean R. Gits, Chief Deputy Federal Public Defender, Los Angeles, Calif.

Supreme Court, U.S.
FILED

NO. 031039 JAN 15 2004

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Fax: (619) 645-2191
Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The mitigating evidence at issue in *Boyde* was pre-crime evidence in mitigation. Relying on *Boyde*, the California Supreme Court held that California's "catch-all" mitigation instruction in this capital case is constitutional as applied to post-crime evidence in mitigation. In a 6-5 decision, the en banc Ninth Circuit held that the California Supreme Court decision was objectively unreasonable "because *Boyde* does not control this case." The question presented is:

Did the Ninth Circuit violate 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereinafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit (en banc) following remand by this Court is reported at *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) ("*Payton II*") and contained in Appendix A. This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported at *Woodford v. Payton*, 123 S. Ct. 1785, 155 L. Ed. 2d 662 (2003) and is contained in Appendix B. The opinion of the Ninth Circuit (en banc) preceding remand by this Court is reported at *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) ("*Payton I*") and contained in Appendix C. The opinion of the Ninth Circuit (panel) is reported at *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001) and contained in Appendix D. The order of the District Court is unreported and contained in Appendix E.

The opinion of the Supreme Court of California is reported at *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1992) and is contained in Appendix F.

STATEMENT OF JURISDICTION

An en banc panel of the Ninth Circuit entered judgment granting habeas corpus relief on October 20, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

California Penal Code section 190.3, which provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

App. G.

STATEMENT OF THE CASE

Underlying Facts And The Trial

In the early hours of May 26, 1980, Respondent William Charles Payton went to the home of Patricia Pensinger in Garden Grove, California, where he had once been a boarder. After receiving permission from Patricia to sleep on her couch, Payton entered the room of one of Patricia's borders, Pamela Montgomery, and raped and stabbed her to death.

After cleaning himself off in the bathroom, Payton entered Patricia's bedroom while she and her ten year old son, Blaine, slept. Payton inflicted 40 stabs wounds to Patricia's face, neck, back and chest. He inflicted 23 stabs wounds to Blaine's face, neck and back. Both survived. A state court jury found Payton guilty of first-degree murder, rape and two counts of attempted murder. The jury further found true the special circumstance of murder in the commission or attempted commission of rape and the personal knife use enhancement.

At the penalty phase, the prosecutor introduced evidence of a prior incident in which Payton stabbed a former girlfriend in the chest and arms after waking her, and Payton's jail house conversations in which he said he had "a severe problem with

sex and women" and "that all women on the street that he had seen was [sic] a potential victim, regardless of age or looks." In mitigation, Payton's defense presented post-crime character evidence consisting of eight witnesses who testified that he had made a sincere commitment to God while in prison, had a calming effect on other prisoners, and could help others while in prison through Bible study classes and a prison ministry.

During closing argument, the prosecutor and Payton's defense counsel discussed California's then existing "catch-all" mitigation evidence instruction ("factor (k)"), California Penal Code section 190.3(k), which advised the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Jury Instructions, Criminal, No. 8.84.1 (4th ed. 1979) ("CALJIC"). The prosecutor argued, in pertinent part, that the instruction "doesn't refer to anything after the fact or later," and defense counsel unsuccessfully moved for mistrial. The judge, however, admonished the jury, "[a]gain, I want to emphasize to you that comments by both prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." Thereafter, the prosecutor concluded:

> How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, . . . Blaine Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old.

Defense counsel argued to the jury that the factor (k) instruction was a catch-all instruction designed to include the kind of evidence that Payton presented.

The trial court's final instructions to the jury included the following direction concerning the consideration of mitigation evidence:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

The jury returned a verdict of death. The trial court denied Payton's motion to modify the verdict and sentenced Payton to death for the murder of Pamela Montgomery and to 21 years and eight months in state prison for the rape of Pamela Montgomery and the attempted murders of Patricia and Blaine Pensinger.

Direct Appeal To The California Supreme Court

On automatic appeal to the California Supreme Court, Payton argued that his penalty-phase jury was unconstitutionally precluded from considering his mitigation evidence in determining whether he should receive a sentence of life or death. He maintained that the trial court's instructions were inadequate to counter the prosecutor's misstatement of law advising the jury that it could only consider circumstances related to the crime. In a 5-2 decision, the California Supreme Court rejected his claims and affirmed Payton's convictions and sentence of death. Applying, *Boyde v. California*, 494 U.S. 370 (1990), the California Supreme Court held that it is not reasonably likely that Payton's jury understood the court's instructions as precluding consideration of his non-crime related evidence in mitigation. App. F at 140, 162, 164.

The California Supreme Court found that Payton's jury was instructed with the same "catch-all" mitigation instruction

that this Court in *Boyde* found constitutional, and that this Court's decision in *Boyde* rejected many of the precise arguments made by Payton. App. F at 160-162. Thus, citing *Boyde*, the California Supreme Court held that, although the trial court "did not embellish the language of factor (k), that fact standing alone does not support a claim of error." App. F. at 164. Additionally, the California Supreme Court examined the instructions "in the context of the proceedings" as required under *Boyde*. The California Supreme Court found that the prosecutor's incorrect interpretation of the "catch-all" mitigation instruction was blunted by: (1) the court's other standard instructions, the same instructions that *Boyde* held "made it even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime related evidence in mitigation;" (2) the fact that arguments of counsel carry less weight than instructions from the court; (3) the prosecutor's own discussion of Payton's mitigating evidence; (4) defense counsel's correct statement of the law; and (5) the fact that the only evidence in mitigation presented by Payton related to his post-crime religious conversion and good works in prison. Accordingly, the California Supreme Court found neither the instruction nor the context of the proceedings was reasonably likely to mislead Payton's jury into believing it could not consider Payton's post-crime character evidence in mitigation in determining his sentence. App. F at 161-164. Payton's petition for certiorari was denied. *Payton v. California*, 510 U.S. 1040 (1994).

***De Novo* Federal Habeas Corpus Review**

On May 6, 1996, Payton filed his first petition for a writ of habeas corpus in the United States District Court for the Central District of California. Although his petition was filed after the effective date of AEDPA, the District Court (and later the Ninth Circuit panel and the initial en banc panel of the Ninth Circuit) reviewed Payton's claims *de novo*.

The District Court granted the petition as to the penalty phase, holding that the prosecutor's incorrect factor (k) argument so infected the penalty trial as to deny Payton a fair trial. App. E at 131, 138. On appeal to the Ninth Circuit, a divided panel reversed the grant of habeas relief, holding that the prosecutor's incorrect argument did not so infect the penalty trial as to preclude consideration of Payton's mitigation evidence. App. D at 98-107. The Ninth Circuit granted Payton's petition for rehearing en banc.

In a 6-5 opinion, an en banc panel of the Ninth Circuit affirmed the district court's grant of habeas relief as to the penalty phase. App. C at 71. Applying *de novo* review, the majority found:

> *Boyde* did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which more readily fits within factor (k).

App. C at 60 (internal quotation and citation omitted) (Paez, J., joined by Schroeder, C.J., Pregerson, J., Tashima, J., W. Fletcher, J., and Berzon, J.).

According to the majority opinion:

> Most naturally read, the phrase "extenuates the gravity of the crime" refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.

App. C at 59. The majority ruled that, "[u]nlike the pre-crime evidence in *Boyde*, post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned

factor (k) instruction. Mitigation evidence occurring after the crime cannot possibly 'extenuate the gravity of the crime.'" App. C at 61. Therefore, the majority concluded, "[b]ecause the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper's* [*v. South Carolina*, 476 U.S. 1 (1986)] requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty." App. C at 61. Accordingly, the majority held, "[s]tanding alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." App. C at 61.

The majority further held that, because there was "an absence of instruction" directing the jury to consider Payton's post-crime evidence in mitigation, the prosecutor's incorrect argument concerning factor (k) constituted the instructions to the jury. As such, there was a reasonable likelihood the jury understood the instructions as precluding consideration of Payton's mitigation evidence. App. C at 62-66. The majority then imposed an affirmative duty on the state trial court to instruct Payton's jury "that it must take his post-crime mitigation evidence into account in determining whether to impose a sentence of life or death." App. C at 71.

The dissent, also applying the higher *de novo* standard of review, concluded that *Boyde's* holding—that the "catch-all" mitigation instruction was constitutionally adequate—applied equally to Payton's case. App. C at 72 (Tallman, J., joined by Kozinski, J., Trott, J., Fernandez, J., and T.G. Nelson, J.). Like the California Supreme Court majority, the dissent noted *Boyde's* conclusion that factor (k) permitted consideration of "any other circumstance," not just circumstances related to the crime. App. C at 76-77. Further, the dissent reasoned, "as both the Supreme Court in *Boyde* and our court's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what defense counsel tried to show during the penalty phase – that Payton had undergone a character transformation after being jailed." App. C at 78. The

dissent concluded: "there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k)." App. C at 78.

The dissent also found that "the context of the proceedings" further bolstered its conclusion that there was no reasonable likelihood the jury understood the instructions to preclude consideration of Payton's mitigation evidence. Like the California Supreme Court, the dissent relied upon *Boyde's* principles that arguments of counsel carry less weight, a jury is not likely to disregard the only evidence presented, and that other instructions told the jury to consider all of the evidence. App. C at 78-83.

Federal Habeas Corpus Review Under AEDPA

Pursuant to *Woodford v. Garceau*, 538 U.S. 202 (2003), the Court granted the State's petition for a writ of certiorari and remanded this case to the Ninth Circuit to reconsider its decision under the principles of AEDPA. App. B at 45.

By the identical 6-5 vote, the en banc panel of the Ninth Circuit again affirmed the district court's grant of habeas relief as to the penalty phase on the ground that California's "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation and that it was reasonably likely that Payton's jury understood the court's instructions as precluding consideration of Payton's post-crime character evidence in mitigation.

Writing for the majority, Judge Paez acknowledged the California Supreme Court's correct recitation of clearly established law, namely, that the Eighth Amendment requires the sentencer in a capital case to consider and give effect to all relevant mitigation evidence offered by the defendant. App. A at 14-15. However, the majority found that the California Supreme Court unreasonably applied this precedent because, in

analyzing Payton's claim, the California Supreme Court "focused entirely on the United States Supreme Court's decision in *Boyde*," which "does not control this case." App. A at 15. The majority then reiterated its reasoning that *Boyde's* decision to uphold the constitutionality of the "catch-all" mitigation instruction turned on the pre-crime nature of Boyde's character and background evidence because such evidence related to the crime by providing an "excuse" for the crime. App. A at 15. In contrast, found the majority, Payton's post-crime character evidence "cannot possibly 'extenuate the gravity of the crime.'" App. A at 17.

The majority also found that the California Supreme Court was objectively unreasonable in finding the "context of the proceedings" did not mislead the jury concerning its ability to consider Payton's mitigation evidence. The majority found wholly inapplicable *Boyde's* principles that arguments of counsel carry less weight, that a jury is not likely to disregard the only evidence presented, and that the other instructions told the jury to consider all of the evidence. According to the majority, these principles also turned on the pre-crime nature of the Boyde's evidence and further on the lack of objectionable argument by the prosecutor. App. A at 16-17. The majority concluded that because the prosecutor in Payton's trial misstated the law and Payton's mitigation evidence was post-crime, the California Supreme Court was objectively unreasonable in applying *Boyde's* principles to Payton's case. App. A at 20-25. Consequently, the majority opinion again held: "Payton is entitled to a penalty trial before a jury who is properly instructed that it must take his post-crime evidence in mitigation into account in determining whether to impose a sentence of life or death." App. A at 30.

The dissent began by observing that "[t]oday, six judges of this court announce that the legal conclusion reached by *seven*[1/] of their colleagues (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law." (Emphasis in original). App. A at 31. To the contrary, contended the dissent, the "California Supreme Court's application of *Boyde* was not only reasonable but correct." App. A at 33. The dissent reiterated its position that *Boyde's* holding concerning the constitutionality of the "catch-all" instruction applied equally to Payton's post-crime evidence in mitigation. App. A at 33-36. Moreover, the dissent emphasized the limits on federal habeas corpus review imposed by AEDPA:

> Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it concerned pre-crime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigation evidence dichotomy offered by the majority is the majority's own untenable invention – not that of the United States Supreme Court. AEDPA commands we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to over-turn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

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1. The seven judges of the Ninth Circuit who reviewed Payton's claim of constitutional error *de novo* consist of the five dissenting judges in the initial en banc opinion (Judges Tallman, Kozinski, Trott, Fernandez, and T.G. Nelson) and the two judges of the three judge panel (Judges Rymer and Gould).

App. A at 41. The dissent similarly found that the California Supreme Court's thorough analysis of the "context of the proceedings" "faithfully followed the dictates of *Boyde*, the most analogous Supreme Court case." App. A at 37. In the end, argued the dissent, "[t]he California Supreme Court is just as qualified as we are to distinguish and apply United States Supreme Court precedent. The majority's 'readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" App. A at 41 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)).

REASONS FOR GRANTING THE WRIT

This Court's intervention is needed because the Ninth Circuit has so far departed from the acceptable and usual course of judicial proceedings. Last term, this Court remanded this case to the Ninth Circuit with instructions to reevaluate its initial en banc decision under the principles governing AEDPA. With no more than a few superficial changes and a citation to AEDPA, the Ninth Circuit issued a virtually identical opinion, again affirming the grant of habeas relief. By the same 6-5 vote, the Ninth Circuit held "objectively unreasonable" the legal conclusion of 12 judges — five justices of the California Supreme Court and seven judges of the Ninth Circuit — that, pursuant to *Boyde*, California's "catch-all" mitigation instruction is constitutional as applied to post-crime evidence in mitigation and that there was no reasonable likelihood Payton's jury understood the court's instructions as precluding his evidence in mitigation.

The Ninth Circuit continues to act as if there is no meaningful difference between the "unreasonable application" review under AEDPA and pre-AEDPA *de novo* review. This Court's recent *per curiam* decisions confirm that the courts of appeals need additional guidance concerning the scope of review under the AEDPA. *Yarborough v. Gentry*, 124 S. Ct. 1 (2003); *Early v. Packer*, 537 U.S. 3 (2002); *Visciotti*, 537 U.S.

19; *Mitchell v. Esparza*, 124 S. Ct. 7 (2003); see also *Lockyer v. Andrade*, 538 U.S. 63 (2003) (rejecting methodology used by Ninth Circuit in applying AEDPA). This Court's intervention is needed to provide guidance on the limits of a federal habeas court's ability to distinguish Supreme Court precedent to avoid reasonable state court decisions.

The Ninth Circuit's decision not only contravenes AEDPA, it contravenes this Court's decision in *Boyde* that California's "catch-all" mitigation instruction satisfies the Eighth Amendment because it permits a jury to consider "any other circumstance" which extenuates the gravity of the crime, not just circumstances related to the crime. The Ninth Circuit circumvented that decision by limiting *Boyde* to pre-crime character evidence in mitigation. It then compounded the error by imposing a duty on the State to rewrite its jury instruction to specifically instruct Payton's jury "that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death." The Ninth Circuit's unduly constricted reading of *Boyde* and its imposition of an affirmative duty to instruct on post-crime mitigation evidence have the potential to undermine the validity of numerous California death sentences as well as the sentencing schemes in other jurisdictions that do not specifically call for pinpoint consideration of post-crime mitigation evidence or other specific categories of mitigation evidence. For this reason as well, the exercise of this Court's supervisory power is needed.

I.

THE EN BANC NINTH CIRCUIT FAILED TO ADHERE TO THE LIMITS CONGRESS IMPOSED, THROUGH AEDPA, ON FEDERAL HABEAS CORPUS REVIEW

Under the requirements of AEDPA, a federal court "shall not" grant a writ of habeas corpus to a state prisoner with

respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 123 S. Ct. 1848 (2003). A state court decision constitutes an "unreasonable application" of this Court's precedent if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). It is now well settled that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Andrade*, 123 S. Ct. at 1174-75. Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Andrade*, 123 S. Ct. at 1175.

This "highly deferential standard for evaluating state court rulings" demands that federal courts give state court decisions "the benefit of the doubt." *Visciotti*, 537 U.S. at 24; *Williams v. Taylor*, 529 U.S. 362, 404-13 (2000). In that regard, AEDPA modified the role of federal habeas courts to, inter alia, "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Although the Ninth Circuit en banc majority cited this precedent and labeled the California Supreme Court's decision "objectively unreasonable," its analysis demonstrates it did not adhere to the requirements of AEDPA but instead, again, substituted its own judgment. As noted by the dissent, even if the California Supreme Court were incorrect it was surely not "objectively unreasonable." App. A at 41. Indeed, a review of the Ninth Circuit's reasoning shows that, not only was the California Supreme Court reasonable, it was correct. Only by utterly disregarding the limits imposed by AEDPA could the Ninth Circuit have affirmed the grant of habeas relief.

A. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, Factor (K) "Standing Alone" Satisfies The Eighth Amendment

The first basis upon which the en banc Ninth Circuit relied in finding the California Supreme Court's decision objectively unreasonable was the California Supreme Court's reliance on *Boyde* for the proposition that factor (k), on its face, satisfies the Eighth Amendment. The Ninth Circuit acknowledged that *Boyde* so held but concluded that *Boyde's* holding applies only to cases involving pre-crime evidence in mitigation. App. A at 13-15. But in drawing that distinction, the majority adopted the very argument this Court rejected in *Boyde*, namely, that California's "catch-all" mitigation instruction limits the jury's consideration of mitigation evidence to circumstances *related to the crime*. App. A at 15-17.

The central issue in *Boyde*, as in Payton's case, was whether the "catch-all" mitigation instruction limits the jury to consideration of mitigation evidence directly related to the crime in violation of the Eighth Amendment's requirement that a jury "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78. As noted by the dissent, this Court in *Boyde* emphatically rejected such a reading. App. A 33. *Boyde* held: "The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes background and character." *Boyde*, 494 U.S. at 382 (emphasis in original). Thus, this Court held that California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted consideration of "any other circumstance" in mitigation when determining whether to impose the death penalty. *Id.* at 380-82.

The Ninth Circuit majority side-stepped *Boyde* by relying on *factual* differences immaterial to the holding and reasoning of *Boyde*, which applies equally to pre-crime and post-crime evidence in mitigation. First, nothing is excluded by the phrase "any other circumstance" — hence, under the "catch-all" mitigation instruction, any and all evidence in mitigation is subject to consideration when determining whether to impose the death penalty.

Second, as even the majority concedes, under *Boyde* the "catch-all" mitigation instruction permits consideration of character evidence, which is precisely what Payton presented. App. A at 16. As noted by the dissent from the initial en banc decision, "[o]nce one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths." App. C at 78.

"Extenuates the gravity of the crime" in simple terms means to make the defendant's conduct somehow less severe. The term "extenuate" is defined as "To lessen or attempt to lessen the magnitude or seriousness of, especially by providing partial excuses." *The American Heritage Dictionary of the English Language*, 4th ed. Boston: Houghton Mifflin, 2000. Thus, if the defendant presents evidence of a troubled childhood as in *Boyde* or redemption as in *Payton*, such evidence may lessen the magnitude of the crime because it suggests a basis for a sentence less than death. Accordingly, the California Supreme Court was more than reasonable in concluding that *Boyde's* holding that factor (k) is constitutionally adequate applies equally to pre-crime and post-crime evidence in mitigation, particularly when it relates to character.

Nor is there any merit to the other reasons posited by the Ninth Circuit for rejecting as unreasonable the California Supreme Court's application of *Boyde* to post-crime mitigating evidence. In limiting *Boyde's* holding that factor (k) is

constitutional to cases involving pre-crime evidence in mitigation, the Ninth Circuit pointed to the reference in *Boyde* to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." App. A at 15, citing *Boyde*, 494 U.S. at 382 (internal citations and quotation marks omitted) (emphasis in original). According to the Ninth Circuit, "whereas there may be no reason to doubt, in light of society's 'long held' views, that a jury would consider a defendant's pre-crime background in sentencing him, there is reason to doubt that a jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison." App. A at 15-16.

However, an equally long held view is the significance of rehabilitation and remorse in determining the appropriate sentence. It is precisely this view upon which Eighth Amendment jurisprudence relies in requiring juries in capital cases to consider post-crime evidence in mitigation, such as remorse or good behavior in prison. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) ("[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."). Therefore, it was perfectly reasonable for the California Supreme Court to conclude that under factor (k), a jury would consider post-crime evidence of a defendant's religious conversion and good behavior in prison in determining whether the severity of the crime is extenuated.

Finally, even if the six judges of the Ninth Circuit correctly distinguished *Boyde* along the pre-crime/post-crime axis, that is

not the sole reasonable interpretation of that decision. Accordingly, the California Supreme Court's application of *Boyde* was not "objectively unreasonable," precluding relief in habeas corpus.

B. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, The "Context Of The Proceedings" Did Not Give Rise to An Eighth Amendment Violation

The en banc Ninth Circuit further violated AEDPA and the principles of *Boyde* with its analysis of whether the factor (k) instruction, "in the context of the proceedings," violated the Eighth Amendment. In finding that the California Supreme Court unreasonably applied *Boyde* when it held that the prosecutor's incorrect argument did not undo the court's proper instructions, the Ninth Circuit ruled that *Boyde's* principle that arguments of counsel generally carry "less weight" than instructions from the court applies only when there is no objectionable argument by the prosecutor. App. A at 18 ("Key to the Court's reasoning was the fact that there was 'no objectionable prosecutorial argument.'"). The principle set forth by this Court in *Boyde*, however, did not turn on the correctness of the prosecutor's argument. *Boyde* expressly stated: "This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85.[2]

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2. Ironically, in a separate case, the Ninth Circuit held that the state court acted contrary to *Boyde* by considering the prosecution's *correct* statement of law in argument to the jury in determining whether there was a reasonable likelihood the jury misunderstood the instructions. *McNeil v. Middleton*, 344 F.3d 988, 994 (9th Cir. 2003), petition for certiorari to be filed

In a similar fashion, the majority reinterpreted the remaining factors which this Court in *Boyde* held, and the California Supreme Court agreed, made it even more improbable a jury would misunderstand California's "catch-all" mitigation instruction to preclude consideration of non-crime related evidence in mitigation. Thus, contrary to *Boyde*, the majority found that the trial court's additional instructions, which were also given in Boyde's trial, compounded the problem with the "catch-all" mitigation instruction. App. A at 20-24 n.13-15.

And the majority simply ignored the principle in *Boyde* that a jury would not readily interpret California's "catch-all" mitigation instruction to disregard the *only* evidence presented in mitigation, particularly when there is no objection to the introduction of the evidence. *Boyde*, 494 U.S. at 383-84. The California Supreme Court, however, recognized that:

> For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde*, "that reasonable jurors would believe the court's instructions transformed all of [defendant's] 'favorable testimony into a virtual charade.'" (*Boyde*,

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sub nom. Middleton v. McNeil concurrently with the instant petition. In other words, under Ninth Circuit law, incorrect arguments by prosecutors can undo correct instructions (*Payton*), but correct arguments by prosecutors cannot save ambiguous instructions (*McNeil*).

> *supra*, 494 U.S. at p. 383 . . . .) The high court's observation is especially apt when the trial court, as here, has also instructed the jury to consider "all of the evidence which has been received during any part of the trial" in determining the penalty. (See *ibid.*)

App. F at 163. The California Supreme Court's application of *Boyde* is similar to that employed by this Court in *Buchanan v. Angelone*, 522 U.S. 269 (1998). Like the California Supreme Court, this Court in *Buchanan* found, under *Boyde*, that it was "not likely that the jury would disregard [two days of testimony of mitigation evidence] in making its decision, particularly given the instruction to consider 'all of the evidence.'" *Buchanan*, 522 U.S. at 278. The similar interpretations of the principles of *Boyde* confirms the California Supreme Court, if not correct, was at least reasonable in its application of *Boyde*. See *Price v. Vincent,* 123 S. Ct. at 1848.

In sum, in order to find the California Supreme Court's decision objectively unreasonable the en banc Ninth Circuit majority interpreted *Boyde* in a manner not only inconsistent with *Boyde* itself but also inconsistent with this Court's interpretation of *Boyde* in subsequent cases. The Ninth Circuit's opinion does not reflect a court giving the state court the benefit of the doubt or the judgment the full effect as required under the AEDPA. It is just the opposite. The Ninth Circuit's refusal to follow the dictates of AEDPA undermines the careful balance Congress struck when it enacted that law, between the state on the one hand, and the federal courts on the other. A writ of certiorari should therefore issue.

II.

THE NINTH CIRCUIT'S INTERPRETATION OF *BOYDE* ALSO JEOPARDIZES THE VALIDITY OF NUMEROUS OTHER DEATH SENTENCES AND SENTENCING SCHEMES WHICH DO NOT CALL FOR PINPOINT MITIGATION INSTRUCTIONS

The implications of the majority's decision extend far beyond the reversal of Payton's death penalty. The decision jeopardizes the validity of numerous death penalty cases in California in which the defendant relied, at least in part, on post-crime mitigation evidence and the jury was instructed with this same "catch-all" mitigation instruction. See, e.g., *People v. Brown*, 45 Cal. 3d 1247, 1252-56, 756 P.2d 204, 248 Cal. Rptr. 817 (1998) (defendant remorseful and no threat in custody because only threat to women); *People v. Gates*, 43 Cal. 3d 1168, 1197, 1199-1200, 743 P.2d 301, 240 Cal. Rptr. 666 (1987) (good prisoner), *cert. denied*, 486 U.S. 1027 (1988); *People v. Mincey*, 2 Cal. 4th 408, 472, 827 P.2d 388, 6 Cal. Rptr. 2d 822 (1992); *People v. Hernandez*, 47 Cal. 3d 315, 355, 365-66, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) (difficulty of life in prison), *cert. denied*, 491 U.S. 910 (1989); *People v. Gonzalez,* 51 Cal. 3d 1179, 1204, 1225, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990); *People v. Jones*, 53 Cal. 3d 1115, 1128, 1146, 811 P.2d 757, 282 Cal. Rptr. 465 (1991) (good prisoner). Most recently, in *Belmontes v. Woodford*, 350 F.3d 861 (Nov. 20, 2003 [9th Cir. 2003]), the Ninth Circuit again limited *Boyde's* holding to cases involving only pre-crime evidence in mitigation and reversed another death penalty because the "catch-all" mitigation instruction did not allow for consideration of Belmontes' post-crime evidence in mitigation. *Id.* at 901-02, 904.

The Ninth Circuit's limitation of *Boyde* further jeopardizes other California death judgments because the Ninth Circuit uses it as a basis for ordering California trial courts to rewrite its jury instructions to call for pinpoint consideration of a defendant's specific category of mitigation evidence. As such, the Ninth Circuit's order to instruct Payton's jury "that it must take his post-crime mitigation evidence into account in determining whether to impose a sentence of life or death" not only contravenes *Boyde's* holding that factor (k) permits consideration of such non-crime related mitigation evidence, but it also runs contrary to this Court's precedent providing that "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigation evidence." *Buchanan*, 522 U.S. at 276. In *Buchanan*, this Court noted: "we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* at 276.

The Ninth Circuit's decision also has potential consequences beyond California, as did *Boyde* itself, and could undermine sentencing schemes in other jurisdictions that do not specifically call for pinpoint consideration of post-crime mitigation evidence or other specific categories of mitigation evidence. This Court's intervention and guidance is warranted and urgently needed.

CONCLUSION

The petition for certiorari should be granted.

Dated: January 13, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

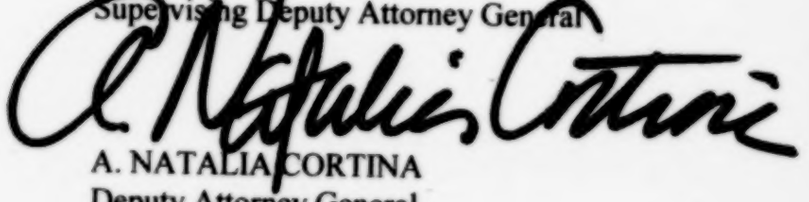
MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

WILLIAM M. WOOD
Supervising Deputy Attorney General

STEVEN T. OETTING
Supervising Deputy Attorney General



A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX A

APPENDIX A

[Filed October 20, 2003]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99000 D.C. No.. CV-94-04779-R

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99003 D.C. No. CV-94-04779-R

On Remand from the United States Supreme Court

Filed October 20, 2003

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, A. Wallace Tashima, William A. Fletcher, Richard A. Paez, Marsha S. Berzon and Richard C. Tallman, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Tallman

COUNSEL

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Frederick R. Millar, Jr., Deputy Attorney General, A. Natasha Cortina, Deputy Attorney General, Nancy L. Palmieri, Deputy Attorney, General, Esteban Hernandez, Deputy Attorney General, San Diego, California, for respondent-appellant Jeanne S. Woodford.

Maria E. Stratton, Federal Public Defender, Dean R. Gits, Deputy Federal Public Defender, Office of the Federal Public Defender, Los Angeles, California, and Rosalie L. Rakoff, A Professional Corporation, Santa Monica, California, for petitioner-appellee William Charles Payton.

OPINION

PAEZ, Circuit Judge:

A California jury convicted William Charles Payton ("Payton") of the first degree murder and rape of Pamela Montgomery and the attempted murder of Patricia Pensinger and her son, Blaine Pensinger. Payton was sentenced to death. Payton appealed both his underlying conviction and death sentence.

On direct appeal, the California Supreme Court affirmed both his conviction and his sentence. *People v. Payton*, 839 P.2d 1035 (Cal. 1992). Payton filed a petition for a writ of habeas corpus and a subsequent amended habeas petition in federal district court, pursuant to 28 U.S.C. § 2254, after exhausting his state court remedies. Payton raised several

arguments in his habeas petition relating to the guilt and penalty phases of his trial. At issue here is Payton's contention that the jury did not consider, in imposing the death penalty, potentially mitigating evidence of his post-crime religious conversion and good behavior in prison. The California death penalty statute contains an eleven-factor test that requires the jury to weigh and balance specific aggravating and mitigating circumstances in deciding whether to impose the death penalty. The first ten factors instruct the judge or jury to evaluate various circumstances specific to the crime and to account for the defendant's age and prior convictions. The eleventh factor—factor (k)—functions as a catchall factor, enabling the judge or jury to consider any other circumstance that the defendant presents in mitigation of a death sentence. During Payton's penalty phase, the trial court used the then-existing model jury instruction that incorporated this multi-factor test. *See* 1 California Jury Instructions, Criminal ("CALJIC") 8.84.1 (4th ed. 1979). This instruction simply quotes factor (k) as it exists in the death penalty statute, directing the jury to consider any circumstance "which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.*; Cal. Penal Code § 190.3 (1978). Payton contended that, although the jury instruction enabled the jury to consider pre-crime character and background evidence, *see Boyde v. California*, 494 U.S. 370 (1990), it limited the permissible scope of factor (k) in such a way as to remove from the jury's consideration the only mitigating evidence he presented during the penalty phase of his trial—evidence of his post-crime religious conversion and good behavior in prison.

The district court rejected Payton's guilt phase arguments but agreed with his penalty phase arguments. The court therefore granted Payton's habeas petition and vacated his death sentence. A three-judge panel of this court, however, disagreed that Payton's penalty phase was fundamentally unfair, reversed the district court, and ordered the writ vacated. *Payton v.*

Woodford, 258 F.3d 905 (9th Cir. 2001). We then took this case en banc, adopted the three-judge panel's decision that there were no guilt phase errors, but affirmed the district court's decision with respect to the penalty phase. We agreed with the district court that there was error during Payton's penalty phase, and we affirmed the grant of Payton's habeas petition. *Payton v. Woodford* ("*Payton I*"), 299 F.3d 815 (9th Cir. 2002) (en banc).

In our initial en banc opinion, we held that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (April 24, 1996) ("AEDPA"), did not apply to our analysis of Payton's habeas claims because Payton filed his petition for the appointment of habeas counsel prior to April 24, 1996, the effective date of AEDPA. *See Payton*, 299 F.3d at 822. In reaching this conclusion, we relied on our prior decision in *Calderon v. United States District Court ("Kelly")*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc), in which we held that a petition for appointment of habeas counsel coupled with a motion for a stay of execution was sufficient for fixing the date for determining when AEDPA applies. After *Payton I*, the Supreme Court issued its decision in *Woodford v. Garceau*, 123 S. Ct. 1398, 1402-03 (2003), in which it held that cases are "pending" before the effective date of AEDPA only if a habeas petitioner has filed an "actual application for habeas corpus relief" in district court; a petition for the appointment of habeas counsel is not enough. In light of its decision in *Woodford v. Garceau*, the Supreme Court granted a writ of certiorari in *Payton I*, vacated the judgment, and remanded the case to us for further consideration. *See Woodford v. Payton*, 123 S. Ct. 1785 (2003).

This opinion ("*Payton II*") reflects our decision on remand.[1] Here, we apply the strict AEDPA standard to our

[1]In this opinion, as in our prior en banc opinion, we address only Payton's habeas claims relating to the penalty phase of his trial. Payton raised several challenges to the guilt phase of his trial and contested his underlying conviction. The district court found no constitutional error in his conviction. In appeal No. 00-99003, Payton challenges the district court's rulings rejecting his claims of ineffective assistance of counsel, prosecutorial misconduct during the guilt phase of the trial, and the cumulative effects of the alleged constitutional errors. The panel affirmed the district court's rulings on these issues, as do we. We adopt the panel's reasoning on the guilt phase issues as our own. *See Payton*, 258 F.3d at 919-25.

analysis of Payton's habeas claims and conclude, as we did in *Payton I*, that the district court properly granted Payton's habeas petition.

BACKGROUND INFORMATION[2]

In 1980, while spending the night at Patricia Pensinger's home, Payton raped Pamela Montgomery and stabbed her to death. He then entered the bedroom of Pensinger and her son Blaine, stabbed each of them repeatedly, and fled. Payton was charged with the first degree murder and rape of Montgomery and the attempted murders of Pensinger and her son.

At the guilt phase of Payton's jury trial, the prosecution presented testimony from the law enforcement officers who observed the crime scene, forensics experts who confirmed that saliva and semen samples taken from Montgomery's body were consistent with Payton's, Patricia and Blaine Pensinger who gave victims' accounts of the attacks, Payton's wife, who stated

[2]We summarize the pertinent facts only briefly. The facts surrounding Payton's conviction are set forth in detail in the opinions of the panel and the California Supreme Court. *Payton*, 258 F.3d at 910-14; *Payton*, 839 P.2d at 1039-40.

that soon after the attacks she saw blood on Payton's clothes, face, hands and penis as well as fingernail scratches and digs on his legs and back, and a fellow inmate, Alejandro Garcia, who recounted that Payton admitted that he raped and stabbed Montgomery and stabbed the Pensingers because he "had this urge to kill." The defense called no witnesses, and the jury convicted on all counts.

During the penalty phase, the prosecution presented as a witness a fellow inmate who testified to his jailhouse conversations with Payton in which Payton admitted that he had "severe problems with sex and women," that he wanted to "stab them and rape them," and that every "wom[a]n on the street he [saw] was a potential victim, regardless of age or looks." Payton's former girlfriend related that she had once awakened to find Payton holding a kitchen knife to her neck, and that he had stabbed her chest and arms. After she pushed him off, he stayed with her and held a towel around her bleeding arm until the police arrived.

The defense presented eight witnesses, including Payton's pastor, a deputy sheriff, four inmates, his mother, and the director of a religious organization ministering to prisoners. Their testimony, taken as a whole, tended to show that Payton had been "born again," made a sincere commitment to God, and was performing good works in jail.

Payton's pastor testified that in his opinion, Payton's conversion was credible and that he was "sincere in his statement and commitment to the Lord." The director of a religious outreach organization ministering to prisoners testified to her numerous conversations with Payton about his spiritual commitment and its manifestation in the bible study groups he established with other inmates. She described his conversion of other inmates, his admission to a correspondence bible college, and his writings.

Four inmates testified that they believed that Payton's religious conversion was sincere and that he had a calming influence on other inmates. One testified that Payton's intervention prevented him from committing suicide. A deputy sheriff assigned to Payton's jail facility related that Payton led prayer meetings and had a positive influence on other inmates. Payton's mother described praying together with her son and discussing religion on a weekly basis. Asked if she had noticed a change in her son, she responded: "Oh, yes . . . . He's totally immersed in the Lord . . . . He's an instrument of the Lord as far as he's concerned."

Prior to closing arguments in the penalty phase, the judge held an in-chambers conference with the attorneys about the jury instructions. They discussed the application of the multifactor CALJIC instruction (No. 8.84.1) that guides the jury in determining whether to impose a sentence of life imprisonment or death.[3] Factor (k), the eleventh and final

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[3]The instruction provided in full:

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or

violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication.

(i) The age of the defendant at the time of the crime.

factor, directed that the jury consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1. Payton's counsel sought an amendment to the instruction that expressly would have directed the jury to consider "evidence of the defendant's character, background, history, mental condition and physical condition."[4] Although the trial judge agreed with the defense counsel's interpretation of factor (k), he declined the request because he was reluctant to alter the instruction insofar as it reflected verbatim the text of California Penal Code § 190.3. He stated that he would allow counsel to argue the point. The judge also denied defense counsel's separate proposal to amend the instruction to permit the jury to consider Payton's "potential for rehabilitation."

During closing argument, the prosecutor argued to the jury that factor (k) applied to "some factor at the time of the offense

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC 8.84.1. In his instructions to the jury, the trial judge omitted the bracketed word "each" and retained the bracketed phrase "except as you may be hereafter instructed."

[4]The proposed amendment read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including evidence of the defendant's character, background, history, mental condition and physical condition."

that somehow operates to reduce the gravity for what the defendant did" but that it did not "refer to anything after the fact or later." He asserted that factor (k) did not encompass Payton's conversion to Christianity and good conduct in jail because they occurred "well after the fact of the crime," and the factor "seems to refer to a fact in operation at the time of the offense." At one point, the prosecutor said:

> What I am getting at, you have not heard during the past few days any legal evidence of mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.

Concluding, the prosecutor told the jury that he did not "want to spend too much time on [Payton's religious conversion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors."

In response to the prosecutor's factor (k) argument, the defense moved for a mistrial, objecting that the prosecutor's argument was "completely contrary to what we all agreed in chambers on the record 'k' was designed to apply to." The court responded that it was a "fair comment on either side" and "I think you can argue it either way." The court told the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective."

Defense counsel's closing argument acknowledged that factor (k) "may be awkwardly worded." He argued that the factor was designed as a catch-all to include the kind of evidence in mitigation he had presented, and that, for Payton, it was the most critical of the factors.

After the closing arguments, the judge instructed the jury as noted above. Upon receiving instructions that it must reach a unanimous result, the jury retired to deliberate. The jury returned a verdict of death.

DISCUSSION

I.

[1] Payton filed his habeas petition on May 6, 1996, after the effective date of AEDPA. In light of *Woodford v. Garceau*, 123 S. Ct. at 1402, AEDPA therefore applies to our analysis of Payton's habeas claims.

[2] The California Supreme Court, in a published opinion, addressed the merits of Payton's factor (k) claims[5] and concluded that there was no instructional error at trial. *See Payton*, 839 P.2d at 1049. According to AEDPA, we must determine whether the California Supreme Court's adjudication of these claims either (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,[6] as determined by the Supreme Court

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[5]After *Payton*, the California Supreme Court decided *People v. Easley*, 671 P.2d 813, 826 n.10 (Cal. 1983), in which it held that trial courts should inform the jury that factor (k) includes any mitigating background and character evidence that the defendant presents in his or her defense. In light of *Easley*, the factor (k) instruction was amended to ensure that the jury consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." *See* CALJIC 8.85(k) (6th ed. 1996). We refer to the factor (k) instruction as it existed prior to this amendment as "unadorned."

[6]"Clearly established" federal law refers to "the

of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). The "unreasonable application" prong, which guides our analysis here, "permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 123 S. Ct. 2527, 2534-35 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). "In other words, a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.' " *Id.* at 2535 (quoting *Lockyer*, 123 S. Ct. at 1175).

"Unreasonable application" means that the state court's application of clearly established Supreme Court precedent was "objectively unreasonable." *Id.*; *see also Lockyer*, 123 S. Ct. at 1175.

We hold that the California Supreme Court unreasonably applied "clearly established" Supreme Court precedent to the facts of this case.

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governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172 (2003). "While Supreme Court precedent is the only authority that is controlling under AEDPA, we look to Ninth Circuit case law as 'persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law.' " *Davis v. Woodford*, 333 F.3d 982, 990-91 (9th Cir. 2003) (quoting *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir.), *amended by* 311 F.3d 928 (9th Cir. 2002)) (internal quotation marks omitted).

A. Controlling Supreme Court Precedent

[3] "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). That is, the Eighth and Fourteenth Amendments require "individualized consideration of mitigating factors" in capital cases. *Lockett*, 438 U.S. at 606; *see also Penry v. Lynaugh*, 492 U.S. 302, 317 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 112. "Relevant mitigating evidence" includes evidence about a defendant's likely future behavior in prison. *See Skipper*, 476 U.S. at 7 ("A defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.").

[4] Supreme Court precedent in force at the time the California Supreme Court decided Payton's factor (k) arguments required that *all* potentially relevant mitigating evidence—pre-crime *and* post-crime—be available to the sentencer in a capital case. "Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. *The sentencer must also be able to consider and give effect to that evidence in imposing sentence*." *Penry*, 492 U.S. at 319 (emphasis added).

The Supreme Court had occasion to analyze the factor (k) instruction at issue here in *Boyde v. California*, 494 U.S. 370 (1990). Specifically, the Court addressed "whether petitioner's capital sentencing proceedings violated the Eighth Amendment

because the trial court instructed the jury in accordance with former CALJIC 8.84.1, including the 'unadorned' factor (k)." 494 U.S. at 377. Boyde contended that factor (k) did not allow the jury to consider and give effect to non-crime-related mitigating evidence, such as his impoverished and deprived childhood and difficulties in school, because the instruction limited the jury to considering only evidence related to the crime. *Id.* at 378, 381. The Court established a standard for reviewing jury instructions that allegedly are "ambiguous and therefore subject to an erroneous interpretation"—"whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this standard to factor (k), "standing alone," the Court concluded that "there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character."[7] *Id.* at 381, 386.

B. The California Supreme Court's Application of Controlling Supreme Court Precedent

The California Supreme Court addressed Payton's argument that "the trial court's instructions and the prosecutor's argument led the jurors to believe, incorrectly, that they were not permitted to consider [his] mitigating evidence." 839 P.2d at 1047. The court acknowledged the teachings of *Eddings*,

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[7]We note that in *Boyde* the trial court explicitly instructed the jury to consider "*any other circumstance* which extenuates the gravity of the crime" and defined "extenuate" as "to lessen the seriousness of a crime as by giving an excuse." 494 U.S. at 381, 382 n.5 (emphasis added). The Court concluded that the jury would "naturally consider" mitigating character and background evidence as "any other circumstance" that might provide such an "excuse." *Id.* at 382 n.5.

Lockett, and *Skipper* that the Eighth Amendment requires the sentencer in a capital case to consider evidence of character and background, including "good behavior in prison." *Id.* at 1070. In analyzing Payton's claims, however, it focused entirely on the Supreme Court's decision in *Boyde*, *id.* at 1070-73, which was an unreasonable application of "clearly established" Supreme Court precedent because *Boyde* does not control this case and, in focusing almost exclusively on *Boyde*, the court did not give proper effect to clearly established Supreme Court cases such as *Skipper* and *Penry* that are controlling here.

Boyde does not control this case for several reasons. First, this case concerns *post-crime* mitigating evidence such as the evidence the Supreme Court considered in *Skipper*.[8] *Boyde*, however, addressed whether there was a reasonable likelihood that the jury applied factor (k) in a way that prevented it from considering *pre-crime* background evidence. The Court relied on "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." *Id.* at 382 (quoting *Penry*, 492 U.S. at 319) (emphasis in original; internal quotation marks omitted). It saw "no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death." *Id.* Whereas there may be no reason to doubt, in light of society's "long held" views, that a jury would consider a defendant's pre-crime background in sentencing him, there is reason to doubt that a

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[8]Payton's religious conversion was not merely an overnight occurrence. Indeed, a year and nine months elapsed from the date of the crime to the date of Payton's death sentence, during which time Payton's conversion and religious good works took place.

jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison.[9]

[5] *Boyde* did not address the question presented here—whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to *post-crime* evidence.[10] Indeed, the Court explicitly distinguished the character and background evidence at issue there from evidence that "pertain[s] to prison behavior after the crime for which [the petitioner] was sentenced to death, as was the case in *Skipper*." *Boyde*, 494 U.S. at 382 n.5. Any natural reading of the words of the unadorned factor (k) does not support the inclusion of

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[9]Indeed, as Justice Kennard noted in her dissent in *People v. Payton*:

> Unlike evidence of a disadvantaged background, [post-crime] evidence does not fit neatly, if it fits at all, into factor (k), because it is not an "excuse" for the commission of the crime. Thus, the jurors in this case were more likely to be misled when they attempted to apply former CALJIC No. 8.84.1 than were the jurors who evaluated the "disadvantaged background" evidence presented by the defendant in *Boyde*.

839 P.2d at 1057.

[10]In *Babbitt v. Calderon*, 151 F.3d 1170, 1178-79 (9th Cir. 1998), we addressed the application of the factor (k) instruction to evidence of Babbitt's background, character, and history. We noted the holding in *Boyde* that the unadorned factor (k) instruction did not preclude consideration of Boyde's character and background. *Babbitt*, like *Boyde*, however, did not address the applicability of the factor (k) instruction to post-crime mitigating evidence such as Payton's.

post-crime evidence because mitigation evidence occurring after a crime cannot possibly "extenuate the gravity of the crime." *Boyde*'s conclusions about the plain wording of factor (k) and the instruction's obvious inclusion of pre-crime background evidence therefore do not apply in this case.

Second, in *Boyde*, the Court rejected Boyde's argument that the prosecutor's comments at sentencing "reinforced an impermissible interpretation of factor (k)" suggesting to the jury that it could not consider Boyde's mitigating character and background evidence. *Id.* at 384-85. The Court reasoned that the prosecutor's arguments "are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates." *Id.* at 384. In addition, "[a]rguments of counsel which misstate the law are subject to objection and correction by the court." *Id.* Key to the Court's reasoning was the fact that there was "no objectionable prosecutorial argument." Indeed, the prosecutor never suggested to the jury that it could not consider mitigating evidence of Boyde's character and background. *Id.* at 385. The prosecutor "*explicitly assumed* that petitioner's character evidence was a proper factor in the weighing process." *Id.* (emphasis added).

Whereas the prosecutor in *Boyde* conceded that the jury must consider Boyde's mitigating character and background evidence, the prosecutor here repeatedly stated to the jury that factor (k) did *not* encompass Payton's mitigating evidence of his religious conversion and good behavior in prison.[11] For

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[11]The California Supreme Court evaluated the impact of the prosecutor's comments on the jury on the basis of only *one* of his comments. The court failed to consider the cumulative impact on the jury of all the prosecutor's comments regarding factor (k) and Payton's post-crime mitigating evidence.

example, after listing the eleven factors in CALJIC 8.84.1, the prosecutor gave his interpretation of factor (k) to the jury:

> 'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact . . . some factor *at the time of the offense* that somehow operates to reduce the gravity for what the defendant did. *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.* (emphasis added)

After the court overruled the defense attorney's objection to the legal misstatements in the prosecutor's argument, the prosecutor continued arguing to the jury:

> Referring back to 'K' which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with Defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. *The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.* [The defense] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when — under any other circumstance which extenuates or lessens the gravity of the crime, refers — seems to refer to a fact in operation *at the time of the offense.* What I am getting at, *you have not heard during the past few days any legal evidence [of] mitigation.* What you've heard is just some jailhouse evidence to win your sympathy, and that's all. *You have not heard any evidence of mitigation in this trial.* (emphasis added)

He then specifically told the jury that it had not "heard anything to mitigate what [Payton's] done" and that Payton's *only* mitigating evidence did not fit into factor (k):

> I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because *I don't think it's really applicable and I don't think it comes under any of the eleven factors.* . . . (emphasis added)[12]

Indeed, the prosecutor focused the jury's attention on the eleven CALJIC factors, which he argued did not encompass Payton's mitigating evidence:

> You shall consider, take into account and be guided by the applicable *factors* of aggravating and mitigating circumstances upon which you have been instructed. In other words, the *factors* I have just read to you.
>
> ****
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> The jury is expected or supposed to go through a weighing process of the *factors* I have just described. (emphasis added)

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[12]We note that the prosecutor's statement appears directly to contradict the California Supreme Court's determination that "the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." 839 P.2d at 1049.

The California Supreme Court recognized that the prosecutor "suggested a narrow and incorrect interpretation of factor (k)," but it reasoned that "[a]ny impact this argument may have had . . . was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument,' and to be placed in [their] proper perspective.' "[13] 839 P.2d at 1048. This was an unreasonable application of *Boyde*.[14]

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[13]The Supreme Court reiterated in *Boyde* the well-established principle that the statements of attorneys "are usually billed in advance to the jury as matters of argument . . . and as the statements of advocates." 494 U.S. at 384. Moreover, the "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Id.* It was an unreasonable application of *Boyde* for the California Supreme Court to assume that the jury, which received instructions that both attorneys' statements were merely argument and not evidence, would accord more weight to defense counsel's argument, containing correct statements of the law with respect to factor (k), such as to "blunt" the effect of the prosecutor's legal misstatements about factor (k). *See Payton*, 839 P.2d at 1048-49. According to *Boyde*, only instructions by the court have the force to "blunt" attorneys' comments. Here, however, the trial court provided no clarifying instructions as to the proper scope of factor (k) to "blunt" the prosecutor's legally erroneous statements.

[14]The court reasoned that it was unlikely that "reasonable jurors would believe the court's instructions transformed all of [defendant's] favorable testimony into a virtual charade." 839 P.2d at 1049 (quoting *Boyde*, 494 U.S. at 383) (internal quotation marks omitted; alteration in original). In *Boyde*, however, the jury received only an ambiguous factor (k) instruction. Here, in contrast, the jury received not only an ambiguous factor (k) instruction, but also explicit, repeated

According to *Boyde*, "the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made." 494 U.S. at 385. In *Boyde*, the factor (k) instruction potentially was ambiguous but the prosecutor correctly stated in his argument that the jury must consider Boyde's mitigating character and background evidence, thus clarifying the scope of the instruction. Here, however, the jury was confronted with an ambiguous factor (k) instruction and with post-crime mitigating evidence that, unlike the pre-crime character and background evidence in *Boyde*, did not fit clearly within the plain wording of the instruction. On top of this, the court explicitly authorized the prosecutor to argue that Payton's post-crime mitigating evidence could not be considered under factor (k), overruled defense counsel's objection to the prosecutor's legal misstatements, and failed to instruct the jury that it must consider and give effect to Payton's post-crime mitigating evidence.[15] This is not a case in which the prosecutor

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arguments by the prosecutor that the defense had presented no mitigating evidence and that post-crime mitigating evidence does not fit into factor (k). This, coupled with the court's instruction, *see infra*, that the jury consider the arguments of counsel, calls into doubt the court's apparent certainty that the jury did not ignore Payton's mitigating evidence.

[15]Defense counsel stated: "My only problem is I think we all agree that that's the law [that factor (k) includes Payton's post-crime mitigating evidence], but the jury's not going to know." The judge replied, "I agree with you." The judge then stated: "I see your position for the edification and clarification of the jury. But I'm going to refuse, as I said, to modify the [factor (k)] instruction . . . I assume *you gentlemen* . . . in your *argument* can certainly relate — relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category 'k' and certainly make a clear argument to the jury."

(emphasis added) The court also instructed the jury to weigh the CALJIC factors, but never explicitly clarified that the jury could consider Payton's post-crime mitigating evidence under factor (k) even though the court agreed with defense counsel that factor (k) encompassed this evidence:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed*. You shall consider, take into account and be guided by the following *factors*, if applicable [lists (a) through (k)].
>
> ***
>
> After having heard all of the evidence and after having heard *and considered the argument of counsel*, you shall consider, take into account and be guided by the applicable *factors* of aggravating and mitigating circumstances upon which you have been instructed.
> (emphasis added)

As Justice Kennard pointed out in her dissent in *People v. Payton*:

> The court's statement to the jury that its considerations of "all of the evidence" should be guided by "the arguments of counsel" and "the applicable factors of aggravating and mitigating circumstances," was tantamount to an instruction to the jury that its power to consider the evidence was not unlimited. This instruction

made an offhand remark during the course of trial. The prosecutor's erroneous argument was far from subtle. It was explicit, deliberate, consistent, and repeated. Indeed, the jury was presented with the prosecutor's and the defense attorney's conflicting arguments about whether it legally could consider Payton's mitigating evidence under factor (k),[16] and the court left it up to the *jury* to choose which version of the law to apply. When the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct.[17]

> could only strengthen the prosecutor's erroneous and repeated argument to the jury that it could not legally consider defendant's mitigating evidence, and the jury may well have acted accordingly.

839 P.2d at 1058.

[16]Because a natural reading of the unadorned factor (k) instruction already favored the prosecutor's interpretation, defense counsel faced a prodigious hurdle in trying to convince the jury of the proper interpretation.

[17]As the dissent noted in *People v. Payton*:

> The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law*, not of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct. The jurors in this case were laypersons; presumably they were unfamiliar with the legislative history of factor (k) or with cases interpreting the Eighth

See Griffin v. United States, 502 U.S. 46, 59 (1991) ("When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."); *Penry*, 492 U.S. at 328 (" 'When the choice is between life and death, that risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.' " (quoting *Lockett*, 438 U.S. at 605)).

[6] In this context, there was a reasonable likelihood that, as a result of the prosecutor's legally erroneous arguments and the court's failure to correct the arguments with proper jury instructions, the jury did not consider and give effect to the post-crime mitigating evidence of Payton's religious conversion and good behavior in prison. This was constitutional error. *See Penry*, 492 U.S. at 326 (reversing a death sentence and remanding for resentencing because, on the basis of the prosecutor's argument and the absence of appropriate jury instructions, "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence"); *Skipper*, 476 U.S. at 5 (holding that post-crime evidence that a defendant would not pose a danger in prison "must be considered potentially mitigating" and "may not be excluded from the sentencer's consideration"); *Eddings*, 455 U.S. at 114-15 (holding that the sentencer in a capital case

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> Amendment. Thus, they were totally unequipped to decide whether the prosecutor or defense counsel had correctly explained to them which evidence they were entitled to consider in deciding whether defendant should live or die.

839 P.2d at 1057.

may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence" and may not give such evidence "no weight"); *Lockett*, 438 U.S. at 608 (striking down Ohio's death penalty statute as violating the Eighth and Fourteenth Amendments due to its "limited range of mitigating circumstances which may be considered by the sentencer" and its preclusion from consideration of other relevant mitigating factors). The California Supreme Court's conclusion to the contrary, on the basis of *Boyde*, which did not address improper legal argument by a prosecutor or a court's failure to provide jury instructions to correct the attorney's legally erroneous argument, was an unreasonable application of "clearly established" Supreme Court precedent. When the effect of a mitigation instruction, viewed in the full context of the trial, is to confuse or mislead the jury in its duty to consider all relevant mitigation evidence, there has been constitutional error.

II.

In light of our conclusion that there was constitutional error, we must now decide whether this error was harmless. We hold that the error was not harmless because it had a "substantial and injurious effect or influence" on the jury's verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and we are left with "grave doubt" as to the harmlessness of the error, *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

As an initial matter, we note that our caselaw is not clear as to whether the petitioner, the state, or neither, bears responsibility for demonstrating the significance of the error under the *Brecht/O'Neal* harmlessness standard. *Compare Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997) (stating that petitioner bears the burden of showing harm); *Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997) (same); *with Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (as amended) (noting that the state bears the burden of showing

harmlessness); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001) (same); *and with Mancuso v. Olivarez*, 292 F.3d 939, 949 n.4 (9th Cir. 2002) (as amended) (attempting to clarify the inconsistency in our caselaw regarding burdens of proof and concluding that "the reviewing court must determine independently whether a trial error had a substantial and injurious effect, without consideration of burdens of proof"); *Thompson v. Borg*, 74 F.3d 1571, 1575 (9th Cir. 1996) (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect).

It is clear from *O'Neal* that the petitioner does not bear the burden of showing harm. 513 U.S. at 436 ("[W]e note that we deliberately phrase the issue in this case in terms of a *judge's* grave doubt, instead of in terms of 'burden of proof.' ") (emphasis added). Because the harmless error analysis is a purely legal question that lies outside the realm of factfinding, we dispense with burdens of proof and presumptions. *See id.* at 437 (explaining that the court must determine whether the error affected the judgment "without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial" (quoting R. Traynor, The Riddle of Harmless Error 26 (1970)). *O'Neal* directs us to ask a "conceptually clearer" question in reviewing the record in a habeas case: " 'Do I, the judge, think that the error substantially influenced the jury's decision?' " *Id.* at 436.

[7] In asking this question, we step back to determine where we are on the spectrum of certainty about the harmlessness of the constitutional error. If we are convinced that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 437 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). If, on the other hand, we are not fairly assured that there was no effect on the verdict, we must reverse. *Id.* In the

"narrow circumstance" in which we are in "grave doubt" as to the effect of the constitutional error, we must assume that there was such an effect, and grant the petition. *O'Neal*, 513 U.S. at 436, 438; *see also Thompson*, 74 F.3d at 1575.

[8] In the course of this inquiry, it is the State that bears the "risk of doubt." *O'Neal*, 513 U.S. at 438; *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 1788 (2003). We look to the State to instill in us a "fair assurance" that there was no effect on the verdict. *See Morales v. Woodford*, 336 F.3d 1136, 1148 (9th Cir. 2003) ("[T]he state must provide us with a 'fair assurance' that the error was harmless under *Brecht*."); *Valerio*, 306 F.3d at 762; *see also O'Neal*, 513 U.S. at 443 ("[T]he State normally bears responsibility for the error that infected the initial trial."). Only if the State has persuaded us that there was no substantial and injurious effect on the verdict do we find the error harmless.

This framework is faithful to the balance the Supreme Court has struck between concerns of federal-state comity and finality in state criminal trials, and the irreversible harm caused by an execution resulting from an unconstitutional error. In weighing these concerns in a non-capital case, the Supreme Court stated:

> [T]he number of acquittals wrongly caused by grant of the writ and delayed retrial (the most serious harm affecting the State's legitimate interests) will be small when compared with the number of persons whom this opposite rule (denying the writ) would wrongly imprison or execute. On balance, we must doubt that the law of habeas corpus would hold many people in prison "in violation of the Constitution," for fear that otherwise a smaller number, not so held, may eventually go free.

O'Neal, 513 U.S. at 443. Placing the "risk of doubt" on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44; *United States v. Olano*, 507 U.S. 725, 741 (1993) (stating that the government bears the "burden of showing the absence of prejudice"); *Chapman v. California*, 386 U.S. 18, 24 (1967) (noting that "the original common-law harmless-error rule put the burden on the beneficiary of the error . . . to prove that there was no injury"). *Kotteakos*, which articulated the harmlessness standard that *Brecht* later adopted and that we now apply, "places the burden on prosecutors to explain why those errors were harmless." *Brecht*, 507 U.S. at 640 (Stevens, J., concurring).[18]

[9] Considering the record before us, the State has not provided us with a "fair assurance" that the error did not prejudice the penalty phase of Payton's trial. *O'Neal*, 513 U.S. at 437-38; *Valerio*, 306 F.3d at 762. On one side of the balance sheet is the State's evidence of aggravating circumstances. There is no question that this was a brutal crime. The prosecution introduced eyewitnesses to Payton's actions, testimony as to his motives and character, and forensic and other evidence to demonstrate to the jury the devastating effects of the crime.

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[18]To the extent that they are inconsistent with this opinion, we overrule the statements in *Rodriguez*, 125 F.3d at 744; *Franklin*, 122 F.3d at 1273; and *Thomas v. Hubbard*, 273 F.3d 1164, 1170 (9th Cir. 2002) (as amended) that appear to place the burden on the petitioner to establish that there was harm under *Brecht*, and the statements in *Fisher*, 263 F.3d at 917, and *Keating*, 191 F.3d at 1062, that appear to place the same burden on the State.

It is the other side of the balance sheet that undermines any assurance that the jury's verdict was not affected. As required by California Penal Code § 190.3, the trial court further instructed the jury that "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death." We have determined that there is a reasonable likelihood that the jury accepted the prosecutor's erroneous statement of the law rather than the defense counsel's and that it therefore failed to consider the only evidence offered in mitigation of the death penalty. That left the jury bereft of any countervailing evidence to weigh against the prosecution's evidence of aggravating circumstances.

[10] We cannot know whether the jury would have returned a verdict of life or of death had it been properly instructed. Payton's extensive evidence of his conversion to Christianity, positive influence on other inmates, and other good works in jail were offered to evoke to the jury his potential for rehabilitation.[19] If the jury had been inclined to weigh favorably evidence of redeeming features of his character or his conduct while in custody pending trial, it would have felt constrained by law from considering that evidence. Without Payton's mitigating evidence, the jury was bound by California Penal Code § 190.3 to impose a death sentence. *See Easley*, 671 P.2d at 827.

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[19]We note that the mitigating evidence strongly suggested that Payton's religious conversion was more than merely a "miracle on the cellblock." Ultimately, however, resolving the question of the depth of Payton's beliefs demands the kind of sifting and weighing of the evidence that is the jury's exclusive realm. *See Skipper*, 476 U.S. at 9 (remanding for new penalty phase trial when exclusion of post-crime mitigating evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender").

[11] Having pondered "all that happened without stripping the erroneous action from the whole," *O'Neal*, 513 U.S. at 437 (quoting *Kotteakos*, 328 U.S. at 764-65), we do not arrive at a fair assurance that the error was harmless. As we have previously stated, "[b]ecause a death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case." *Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."). Far from a fair assurance that the error was harmless, the "possible jury confusion" arising from the trial court instruction leaves us in "grave doubt about the likely effect of [the] error on the jury's verdict." *O'Neal*, 513 U.S. at 435; *see also Fisher*, 263 F.3d at 917-18. We therefore conclude that the instructional error had a "substantial and injurious effect or influence on the jury's verdict" that necessitates a new penalty phase trial. Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death.

CONCLUSION

Accordingly, we AFFIRM the judgment of the district court granting Respondent's motion for summary judgment as to all claims except Claim IVB, item 3 of the petition for habeas corpus, and granting the writ of habeas corpus as to the penalty phase of the trial.

AFFIRMED.

TALLMAN, Circuit Judge, dissenting in part, joined by Circuit Judges Kozinski, Trott, Fernandez, and T.G. Nelson:

Today, six judges of this court announce that the legal conclusion reached by *seven* of their colleagues[1] (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion—that Payton's constitutional rights were not violated by the "unadorned" factor (k) instruction—must be deemed objectively unreasonable. I respectfully dissent.[2]

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[1]*See* 299 F.3d 815, 830 (9th Cir. 2002) (en banc) (Tallman, J., dissenting in part, joined by Judges Kozinski, Trott, Fernandez, and T.G. Nelson); 258 F.3d 905, 910 (9th Cir. 2001) (Rymer, J., joined by Gould, J.)

[2]I concur in the court's decision not to disturb the underlying conviction and to reject most of Payton's challenges to both his conviction and sentence. Maj. Op. at 15174 n.1. No one supports Payton's argument that he received ineffective assistance of counsel at either the guilt or penalty stages of trial. Even though defense counsel did not present any witnesses, not a single member of this en banc panel believes that Payton was prejudiced during the guilt phase in light of the overwhelming evidence against him. Nor does a single judge believe "there is a reasonable probability that, absent [any errors of defense counsel], the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

I

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218, (AEDPA) significantly limited the power of the federal bench to grant a state prisoner's petition for habeas corpus. Post-AEDPA, the successful habeas applicant must convince the federal judge or appellate panel that the state court decision upholding his conviction or sentence is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The majority holds that the California Supreme Court unreasonably applied Supreme Court precedent in upholding Payton's sentence of death. Maj. Op. at 15190. In order for the majority to reach this conclusion, it must have decided that the California Supreme Court's holding was "more than incorrect or erroneous," for the "unreasonable application" clause of § 2254(d)(1) means "objectively unreasonable." *Lockyer v. Andrade*, 123 S. Ct. 1166, 1174 (2003). "It is not enough that a federal habeas court, in its independent review of the legal question is left with a firm conviction that the state court was erroneous." *Id.* at 1175 (citation and quotation marks omitted); *see also Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [United States Supreme Court precedent] incorrectly.")

Did the California Supreme Court *unreasonably* apply United States Supreme Court precedent? Certainly not.

The California Supreme Court explicitly acknowledged the Eighth Amendment requirement that a sentencing jury in a

capital case consider mitigating character and background evidence. *People v. Payton*, 839 P.2d 1035, 1047-48 (Cal. 1992). Then, applying the United States Supreme Court's decision in *Boyde v. California*, 494 U.S. 370 (1990), the California Supreme Court concluded that it was not "reasonably likely that the jurors believed the law required them to disregard [Payton's] mitigating evidence." *Id.* at 1048. In other words, the California Supreme Court determined that Payton's jury heard and considered Payton's mitigating evidence before deciding that death was warranted.

The California Supreme Court's application of the *Boyd* decision was not only reasonable but correct. In *Boyde*, the United States Supreme Court upheld against an Eighth Amendment challenge the same CALJIC jury instruction employed in Payton's penalty trial. The central issue in *Boyde*, as in Payton's case, was whether factor (k)'s language limits the jury to consideration of evidence only directly related to the crime. The United States Supreme Court emphatically rejected such a reading. *See Boyde*, 494 U.S. at 382 ("The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.") (emphases in original); *see also id.* at 383 (finding it "improbable that jurors would arrive at an interpretation that [factor (k)] precludes consideration of all non-crime-related evidence").

Though perhaps it could have, the California Supreme Court did not cite to *Boyde* and end its analysis. Recognizing that "*Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k)," *Payton*, 839 P.2d at 1048, the

court took pains to explain that no misinterpretation occurred here.

First of all, the court stated that the impact of the prosecutor's erroneous argument (that post-crime mitigating evidence should not be considered by the jury) was "blunted" by defense counsel's objection and the trial court's admonition to the jury that counsels' arguments were not evidence.[3] *Payton*,

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[3]In closing argument the prosecutor incorrectly stated that factor (k) "doesn't refer to anything after the fact or later," whereupon the trial court immediately admonished the jury that comments made by counsel were argument, not evidence. I do not understand why we should not accord this standard admonishment the respect we normally afford it in noncapital cases. Jurors are presumed to follow such admonitions absent specific proof that they did not. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The prosecutor's arguments were also of concern in *Boyde*, and the Supreme Court stated:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the

839 P.2d at 1048. Second, the court noted that the prosecutor's own statements lessened the impact of the erroneous argument. "[T]he prosecutor implicitly conceded the relevance of [Payton's] mitigating evidence by devoting substantial attention to it."[4] *Id.* at 1049. Third, and perhaps most significant, the court explained that the jury was unlikely to ignore Payton's mitigating evidence—regardless of the ambiguous factor (k) instruction or the prosecutor's arguments—since doing so would have turned the penalty phase "into a virtual charade." The court stated:

> For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony

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> arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Boyde, 494 U.S. at 384-85 (citations omitted).

[4]The prosecutor certainly erred by arguing that the jury had not heard "any legal evidence in mitigation." But for the majority of his closing, the prosecutor did what he should have done and argued not that jurors could not consider Payton's religious conversion but that they should not *value* it much. The prosecutor argued that the religious conversion would not seem to "lessen the gravity of the offense"; that the defense evidence was offered "to win [the jury's] sympathy"; that Payton's new-found religion could not undo his bad acts from the past; and that while Payton appealed to the jurors' mercy, he had shown none to his victims. The prosecutor also implicitly acknowledged that the evidence presented by the defense counted for *something* when he stated "[i]f you want to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery."

> of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde*, "that reasonable jurors would believe the court's instructions transformed all of [Payton's] 'favorable testimony into a virtual charade.' "

Id. (quoting *Boyde*, 494 U.S. at 383). Moreover, the court noted that the trial court "instructed the jury to consider '*all* of the evidence which has been received during any part of the trial' in determining the penalty." *Id.* (quoting *Boyde*, 494 U.S. at 383) (emphasis added). The trial court's admonition to consider *all* the evidence buoyed the conclusion that the jury considered Payton's mitigating evidence. Finally, the court noted that Payton's attorney, "in his own closing argument, strongly reinforced the correct view that [Payton's] religious conversion was proper mitigating evidence." *Id.* Defense counsel argued: "[S]ection (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence." *Id.*

After this thorough analysis, the California Supreme Court concluded that "it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence." *Id.*

How that decision constitutes an unreasonable application of United States Supreme Court precedent is a mystery to me. The California Supreme Court identified the correct governing rule—that mitigating background and character evidence may not be precluded from the sentencing jury's consideration—and

then decided that the rule was not violated. To reach this decision the California court faithfully followed the dictates of *Boyde*, the most analogous Supreme Court case.

Apparently *Boyde* was the wrong case to apply, for the majority tells us that "*Boyde* does not control this case . . . ." Maj. Op. at 15182. According to the majority, the California Supreme Court was unreasonable because it "did not give proper effect to clearly established Supreme Court cases such as *Skipper [v. South Carolina*, 476 U.S. 1 (1986),] and *Penry [v. Lynaugh*, 492 U.S. 302 (1989),] that are controlling here." *Id.*

Neither *Skipper* nor *Penry* supports the proposition that the California Supreme Court erred, let alone unreasonably applied clearly established federal law. Both cases are plainly distinguishable from the case at bar. In *Skipper*, the trial court *excluded* as irrelevant defense witnesses who would have testified that the defendant had "made a good adjustment" while in prison. 476 U.S. 1, 3 (1986). Payton, in contrast, was not precluded from calling such character witnesses. In fact, Payton called eight witnesses who all testified that Payton had discovered God while in jail.

Penry, at least, has somewhat similar facts to this case. There the defendant produced mitigating evidence of his mental retardation and abused childhood but was still sentenced to death. Like Payton, Penry argued that his constitutional rights were violated by inadequate jury instructions, which effectively precluded the jury from considering his mitigating evidence. The instructions posed three questions for the jury to consider: (1) "Did Penry act deliberately when he murdered [the victim]?" (2) "Is there a probability that he will be dangerous in the future?" (3) "Did he act unreasonably in response to provocation?" 492 U.S. at 320. If the jury answered all three questions in the affirmative, state law required the trial court to impose a sentence of death. *Id.* at 310.

According to the Supreme Court, none of these instructions provided the jury "with a vehicle for expressing its 'reasoned moral response' to [Penry's mitigating] evidence in rendering its sentencing decision." *Id.* at 328. None of the questions allowed the jury to take into account Penry's mental retardation or past child abuse. The first instruction asked the jurors to decide whether Penry acted "deliberately." *Id.* at 322. However, as the Court noted:

> Personal culpability is not solely a function of a defendant's capacity to act "deliberately." A rational juror . . . could have concluded . . . that [Penry] deliberately killed [the victim] to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less "morally culpable than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Id. at 322-23 (internal quotation marks and citation omitted).

The second question, asking whether Penry would be dangerous in the future, also precluded the jury from considering Penry's mitigating evidence. In fact, Penry's mental retardation and childhood abuse suggested that he would pose a continuing threat to society. *Id.* at 324 ("Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."). The final question asked whether Penry's response to the provocation of the victim was unreasonable. The Court held that this instruction similarly did not allow the jury to consider Penry's mitigating evidence because "Penry's

mental retardation and arrested emotional development . . . would not necessarily diminish the 'unreasonableness' of his conduct . . . ." *Id.*

Unlike the instructions in *Penry*, which on their face precluded the jury from considering the defendant's mitigating evidence, the instructions here allowed Payton's jury to consider "*any other circumstance* which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k) (1978) (emphasis added). In *Boyde*—the case the majority desperately wants to ignore—the United States Supreme Court held that "there is not a reasonable likelihood that Boyde's jurors interpreted the [unadorned factor (k) instruction] to prevent consideration of mitigating evidence of background and character." 494 U.S. at 381. Post-*Boyde*, one cannot argue that the unadorned factor (k) instruction is constitutionally deficient on its face as were the instructions given in *Penry*. *Penry* does not control this case. And it certainly does not suggest that the California Supreme Court unreasonably applied United States Supreme Court precedent when it extended *Boyde* to post-crime mitigation evidence.[5]

Why does the majority rely on cases such as *Penry* and *Skipper* while discounting *Boyde*, a case almost directly on

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[5]Other cases cited by the majority, such as *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978), are also distin guishable. In *Eddings*, the trial court heard mitigating evidence of the defendant's violent upbringing and emotional disturbance but improperly decided that such evidence could not be considered as a matter of law. 455 U.S. at 109. In *Lockett*, the Court held that the Ohio death penalty statute was unconstitutional because of "[t]he limited range of mitigating circumstances [provided in the statute] which may be considered by the sentencer . . . ." 438 U.S. at 608.

point?[6] The reason must be that *Boyde* suggests a different result than the one the majority wants to reach. True, *Boyde* concerned "pre-crime" mitigation evidence whereas this case concerns "post-crime" mitigation evidence. But once one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths.

Moreover, as both the *Boyde* Court and the majority's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what Payton's attorney tried to show during the penalty phase—that Payton had undergone a character transformation after being jailed. Witnesses for Payton stated that he turned away from his former evil ways and toward God; he no longer sought to harm and abuse, stab and rape women; instead, he sought to help his fellow male inmates. Payton presented a significant amount of evidence to that effect, and the jury listened to it. We must presume the jury considered it. As the *Boyde* Court noted:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all

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[6]Though when *Boyde* is helpful to the majority's argument, it is cited and applied. *See* Maj. Op. at 15186-87 (explaining that the California Supreme Court's conclusion regarding the impact of the prosecutor's argument that factor (k) precluded post-crime mitigation evidence "was an unreasonable application of *Boyde*").

> that has taken place at the trial likely to prevail over technical hairsplitting.

494 U.S. at 380-81. Unfortunately for Payton, the jury either did not believe this miracle on the cellblock or did not value it much in comparison to the horrific crimes he committed.

Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it concerned precrime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigating evidence dichotomy offered by the majority is the majority's own untenable invention—not that of the United States Supreme Court. AEDPA commands that we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to overturn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

Reasonable minds might disagree as to whether Payton's sentence was based on constitutionally adequate jury instructions, especially considering the prosecutor's erroneous arguments to the jury. But that is not the question before us. For us to grant Payton's petition, the California Supreme Court's decision must have been *objectively unreasonable*, which means "more than incorrect or erroneous." *Andrade*, 123 S. Ct. at 1174. Under this standard it was not. *Boyde*—as well as *Penry* and *Skipper*—gave the California Supreme Court plenty of latitude to reach the decision that it reasonably made. The California Supreme Court is just as qualified as we are to distinguish and apply United States Supreme Court precedent. The majority's "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Visciotti*, 537 U.S. at 24.

II

We turn to the question of harmless error, which the majority hastily jettisons. The prosecutor may have been wrong in urging the jury to disregard the defendant's post-arrest claim of religious conversion, but we must not forget the factual context in which the jury rendered its decision. In the wee hours of the morning of May 26, 1980, William Charles Payton arrived at the Garden Grove, California, home of Patricia Pensinger. Payton, who had once been a boarder in Pensinger's home, found Pensinger awake and working on a crossword puzzle in the kitchen. He informed her that he was experiencing car trouble. Pensinger graciously welcomed Payton into her home and offered him some beer, which he drank while talking with Pensinger until about 4:50 a.m. During their conversation, Pamela Montgomery, a boarder temporarily residing at Pensinger's home, entered the kitchen. Pensinger introduced her to Payton. Montgomery, who was staying with Pensinger while her husband was on duty with the National Guard, filled a glass with water, then left the kitchen and returned to her bedroom. Payton asked Pensinger if he could sleep on the living room couch and Pensinger said he could.

While everyone else in the house was fast asleep, Payton repaid Pensinger for her hospitality by waking her with two blows to her back, stabbing her forty times on her face, neck, back and chest, and stabbing her ten-year-old son, Blaine, twenty-three times in the face, neck and back. Miraculously, both Pensinger and her son survived. Pamela Montgomery was not so lucky. Her body was found after Payton fled the Pensinger residence. He returned to his own home where his wife saw him covered in blood. Forensic evidence suggested either that Payton stabbed Montgomery twelve times during sexual intercourse, or that he raped her while she lay comatose and bleeding to death from her wounds.

William Charles Payton did not suffer from a mental illness; he was not "made bad" by his upbringing; he was not a generally good person who did one heinous act out of character; and he was ably defended by competent counsel. On this record, the jury could easily find that William Charles Payton was a vile human being who chose a despicable path in life that culminated in a series of heinous crimes on the morning of May 26, 1980.

Had Payton changed by the time of his trial and sentencing? Who knows? We do know that the jury heard evidence of his post-crime religious conversion. The conversion may have counted for something, but it was up to a jury two decades ago to decide how to value his fortuitous epiphany. Certainly, there might have been substantial doubt concerning Payton's sincerity given the timing of his religious conversion, but even if his commitment were sincere, the jury may very well have concluded that such matters concerned Payton's soul, not his life.

Our job today is to ask: "Do [we, as judges], think that the error substantially influenced the jury's decision?" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Common sense tells us the answer is no. Abstract legal discussions are important in the development of the law, but so is the ability to look at the impact of those abstract decisions in the context of the real world. Any legal errors in this case were harmless in relation to the acts committed by the man who stood before the jury and asked it to mitigate his sentence based solely on his change of heart after he was caught.

III

Twelve jurors listened to Payton's evidence in mitigation and determined it was not sufficient to avoid a sentence of death. Twelve judges carefully examined the penalty phase

instructions and found them to be constitutionally adequate. Six judges disagree. Objectively, who is being unreasonable?

APPENDIX B

APPENDIX B

[Filed April 21, 2003]

**Jeanne WOODFORD, Warden,
petitioner, v. William
Charles PAYTON.
No. 02-1055.**

April 21, 2003.

Case below, 299 F.3d 815.

On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Motion of respondent for leave to proceed *in forma* pauperis granted. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003).

APPENDIX C

APPENDIX C

[Filed August 1, 2002]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CHARLES PAYTON, *Petitioner-Appellee,* v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99000 D.C. No. CV-94-04779-R

WILLIAM CHARLES PAYTON, *Petitioner-Appellee,* v. JEANNE WOODFORD, Warden, *Respondent-Appellant.*	No. 00-99003 D.C. No. CV-94-04779-R OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted En Banc
March 20, 2002----Phoenix, Arizona

Filed August 1, 2002

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, A. Wallace Tashima, William A. Fletcher, Richard A. Paez, Marsha S. Berzon and Richard C. Tallman, Circuit Judges.

Opinion by Judge Paez; Partial Concurrence and Partial Dissent by Judge Tallman

COUNSEL

Nancy Palmieri, Deputy Attorney General, Esteban Hernandez, Deputy Attorney General of the State of California, Los Angeles, California, for the respondent-appellant-cross-appellee.

Dean R. Gits, Overland & Gits, Santa Monica, California, for the petitioner-appellee-cross-appellant.

OPINION

PAEZ, Circuit Judge:

A California jury convicted Petitioner-Appellee William Charles Payton of the first degree murder and rape of Pamela Montgomery, and the attempted murder of Patricia Pensinger and her son, Blaine Pensinger. The jury imposed the death penalty. Payton appealed both the underlying conviction and the death sentence.

At the penalty phase of a trial in which a death sentence is at stake, a state may not preclude the jury from considering any mitigating circumstance "that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (internal quotations and citations omitted). The

California death penalty statute channels the jury's assessment of the appropriate penalty into an eleven-factor test that structures the jury's weighing and balancing of the aggravating and mitigating circumstances. The first ten factors instruct the trier of fact to evaluate various circumstances specific to the crime and to account for the defendant's age and prior convictions. The eleventh factor — factor (k) — functions as a catch-all, enabling the jury to consider any other circumstance that the defendant presents in mitigation of a death sentence.

We are confronted here with the issue of whether, in Payton's trial, the jury instructions regarding factor (k) impermissibly limited its constitutionally-mandated role as a vehicle for permitting the jury to consider all the mitigating evidence presented regarding whether Payton deserved a life term rather than a death sentence. In instructing the jury, the trial court employed the then-existing model jury instructions which incorporated the multi-factor test in the statute. 1 California Jury Instructions, Criminal ("CALJIC") 8.84.1 (4th ed. 1979). That instruction simply quotes factor (k), directing the jury to consider any circumstance "which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.*; Cal. Penal Code § 190.3 (1978). The Supreme Court, reviewing the same jury instruction in *Boyde v. California*, 494 U.S. 370 (1990), held that the text of factor (k), as clarified by the trial court, enabled the jury to consider precrime character and background evidence. The Court did not address the question of factor (k)'s application to post-crime evidence of rehabilitation, and did not have occasion to evaluate the effect on the jury of a prosecutor's contention that such evidence could not be considered. Those questions squarely confront us here.

At the penalty phase of Payton's trial, the only evidence offered in mitigation was Payton's post-crime conversion to Christianity and his good works while in jail, which were

offered under factor (k). The defense offered no other evidence then or at any other time during his trial. In closing argument, the prosecutor erroneously told the jury that factor (k) did not encompass the only evidence Payton offered to mitigate a sentence of death. Although defense counsel objected to the prosecutor's argument, the trial court failed to cure the error.

On automatic appeal to the California Supreme Court, Payton argued, among other things, that he was deprived of a fundamentally fair trial because the trial court's instructions and the prosecutor's erroneous argument led the jurors to believe that they were not permitted to consider Payton's mitigating evidence. The California Supreme Court affirmed the conviction and sentence. *People v. Payton*, 839 P.2d 1035 (Cal. 1992), *cert. denied*, 510 U.S. 1040 (1994). Subsequently, the California Supreme Court denied Payton's petition for a writ of habeas corpus. Payton then filed a petition for habeas corpus relief in federal court under 28 U.S.C. § 2254 (1994). The district court concluded that the penalty phase of the trial was fundamentally unfair and granted a writ of habeas corpus requiring either a new penalty trial or the reduction of Payton's sentence to a life term without parole. A divided three judge panel of our court reversed the grant of the writ as to the penalty phase. *Payton v. Woodford*, 258 F.3d 905 (9th Cir.), *reh'g en banc granted*, 273 F.3d 1271 (2001).

We then agreed to rehear this case en banc. We affirm the district court's judgment in full. We hold that it is reasonably likely that the text of factor (k) and the trial court's failure to correct the prosecutor's misstatements about the reach of factor (k) caused the jury to disregard relevant mitigating evidence, and that this error was not harmless.[1]

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[1]Payton also contested the underlying conviction, raising several challenges to the guilt phase of his trial. The district court found no constitutional error in his conviction. In appeal

Background[2]

In 1980, while spending the night at Patricia Pensinger's home, Payton raped Pamela Montgomery and stabbed her to death. Payton then entered the bedroom of Pensinger and her son Blaine, stabbed each of them repeatedly, and fled. Payton was charged with the first degree murder and rape of Montgomery, and the attempted murders of Pensinger and her son.

At the guilt phase of Payton's jury trial, the prosecution presented testimony from the law enforcement officers who observed the crime scene; forensics experts who confirmed that saliva and semen samples taken from Montgomery's body were consistent with Payton's; Patricia and Blaine Pensinger who gave victims' accounts of the attacks; Payton's wife, who stated that soon after the attacks she saw blood on Payton's clothes, face, hands and penis as well as fingernail scratches and digs on his legs and back; and a fellow inmate, Alejandro Garcia, who recounted that Payton admitted that he raped and stabbed Montgomery and stabbed the Pensingers because he "had this urge to kill." The defense called no witnesses, and the jury convicted on all counts.

No. 00-99003, Payton challenges the district court's rulings rejecting his claims of ineffective assistance of counsel, prosecutorial misconduct during the guilt phase of the trial, and the cumulative effects of the alleged constitutional errors. The panel affirmed the district court's rulings on these issues, as do we. We adopt the panel's reasoning on the guilt phase issues as our own. *See Payton*, 258 F.3d at 919-25.

[2]We summarize the pertinent facts only briefly. The facts surrounding Payton's conviction are set forth in detail in the opinions of the panel and the California Supreme Court. *Payton*, 258 F.3d at 910-14; *Payton*, 839 P.2d at 1039-40.

During the penalty phase, the prosecution presented as a witness a fellow inmate who testified to his jailhouse conversations with Payton in which Payton admitted that he had "severe problems with sex and women," that he wanted to "stab them and rape them," and that every "wom[a]n on the street he [saw] was a potential victim, regardless of age or looks." Payton's tormer girlfriend related that she had once awakened to find Payton holding a kitchen knife to her neck, and that he had stabbed her chest and arms. After she pushed him off, he stayed with her and held a towel around her bleeding arm until the police arrived.

The defense presented eight witnesses, including Payton's pastor, a deputy sheriff, four inmates, his mother, and the director of a religious organization ministering to prisoners. Their testimony, taken as a whole, tended to show that Payton had been "born again," made a sincere commitment to God, and was performing good works in jail.

Payton's pastor testified that in his opinion, Payton's conversion was credible and that he was "sincere in his statement and commitment to the Lord." The director of a religious outreach organization ministering to prisoners testified to her numerous conversations with Payton about his spiritual commitment and its manifestation in the bible study groups he established with other inmates. She described his conversion of other inmates, his admission to a correspondence bible college, and his writings.

Four inmates testified that they believed that Payton's religious eonversion was sincere and that he had a calming influence on other inmates. One testified that Payton's intervention prevented him from committing suicide. A deputy sheriff assigned to Payton's jail facility related that Payton led prayer meetings and had a positive influence on other inmates. Payton's mother described praying together with her son and

discussing religion on a weekly basis. Asked if she had noticed a change in her son, she responded: "Oh, yes . . . . He's totally immersed in the Lord . . . . He's an instrument of the Lord as far as he's concerned."

Prior to closing arguments in the penalty phase, the judge held an in-chambers conference with the attorneys about the jury instructions. They discussed the application of the multifactor CALJIC instruction that guides the jury in determining whether to impose a sentence of life imprisonment or death.[3]

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[3]The instruction provided in full:

> In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [*sic*] of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though

Factor (k), the eleventh and final factor, directed that the jury consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CALJIC 8.84.1. Payton's counsel sought an amendment to the instruction that expressly would have directed the jury to consider "evidence of the defendant's character, background, history, mental condition and physical condition."[4] Although the trial judge agreed with the defense counsel's interpretation of factor (k), he declined the request because he was reluctant to alter the instruction insofar as it reflected verbatim the text of California Penal Code § 190.3. He stated that he would allow counsel to argue the point. The judge also denied defense counsel's separate proposal to amend the instruction to permit the jury to consider Payton's "potential for rehabilitation."

During closing argument, the prosecutor argued to the jury that factor (k) applied to "some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did" but that it did not "refer to anything after the fact or later." He asserted that factor (k) did not encompass Payton's conversion to Christianity and good conduct in jail because they occurred "well after the act of the crime," and the factor "seems

it is not a legal excuse for the crime.

CALJIC 8.84.1. In his instructions to the jury, the trial judge omitted the bracketed word "each" and retained the bracketed phrase "except as you may be hereafter instructed."

[4]The proposed amendment read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including evidence of the defendant's character, background, history, mental condition and physical condition."

to refer to a fact in operation at the time of the offense." At one point, the prosecutor said:

> What I am getting at, you have not heard during the past few days any legal evidence of mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.

Concluding, the prosecutor told the jury that he did not "want to spend too much time on [Payton's religious conversion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors."

In response to the prosecutor's factor (k) argument, the defense moved for a mistrial, objecting that the prosecutor's argument was "completely contrary to what we all agreed in chambers on the record 'k' was designed to apply to." The court responded that it was a "fair comment on either side" and "I think you can argue it either way." The court told the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective."

Defense counsel's closing argument acknowledged that factor (k) "may be awkwardly worded." He argued that the factor was designed as a catch-all to include the kind of evidence in mitigation he had presented, and that, for Payton, it was the most critical of the factors.

After the closing arguments, the judge instructed the jury as noted above. Upon receiving instructions that it must reach a unanimous result, the jury retired to deliberate. The jury returned a verdict of death.

Discussion

We hold that the district court properly granted the writ of habeas corpus. As a preliminary matter, we confirm that this case is governed by the legal standards in effect prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (April 24, 1996) ("AEDPA"). We then conclude that the relevant inquiry in this case is whether there was instructional error under *Boyde*, 494 U.S. at 380. We hold that, under *Boyde*, there is a "reasonable likelihood" that the jury applied factor (k) in a way that prevented the consideration of constitutionally relevant evidence. *Id.* We further hold that this error was not harmless because of the likelihood that it precluded consideration of the only mitigating evidence that Payton presented at trial.

A. Application of AEDPA

Because Payton filed his petition for the appointment of habeas counsel prior to the effective date of AEDPA, we review the district court's order under pre-AEDPA standards. *See Calderon v. United States Dist. Court ("Kelly")*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (holding that a petition for appointment of habeas counsel, coupled with a motion for a stay of execution, fixes the date for determining whether AEDPA applies). We decline Respondent's invitation to reconsider our decision in *Kelly*.

Applying pre-AEDPA standards, we presume that state court determinations of historical fact are correct. 28 U.S.C. § 2254(d) (1994). In contrast, the application of legal standards to historical facts does not warrant a presumption of correctness under § 2254(d) (1994). *Thompson v. Borg*, 74 F.3d 1571, 1573 (9th Cir. 1996).

B. Instructional Error

[1] The central question in this case is whether the jury received a constitutionally adequate instruction guiding consideration of Payton's mitigating evidence. The Constitution requires a capital jury to consider all relevant mitigating evidence. *Boyde*, 494 U.S. at 377-78; *Eddings*, 455 U.S. at 113-14 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."). This broad permission includes authority to consider evidence of Payton's good conduct after the crime. *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that post-crime good behavior must be considered as mitigating evidence). The trial court's instructions to the jury must impart this constitutional directive.

Respondent urges us to apply the standard for prosecutorial misconduct rather than instructional error and consider whether the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Applying this standard, the district court concluded that Payton's trial had been unconstitutionally infected with unfairness.

We need not go down that road. At bottom, the constitutional violation here flows from the lack of guidance that the jury received regarding its duty to consider mitigating evidence. The prosecutor's arguments cannot be isolated from the instruction itself or from the failure of the trial judge properly to instruct the jury or to correct the prosecutor's error. Thus, the focus of our inquiry is whether, viewing the case as a whole, the court's instructions properly guided the jury to consider Payton's mitigating evidence.

Our approach here is consistent with *Boyde*. In *Boyde*, the Court first determined whether there was a reasonable likelihood that the jury applied the factor (k) instruction in a way that prevented consideration of the mitigating background and character evidence that Boyde presented. 494 U.S. at 381-84. It then turned to Boyde's claim that the prosecutor's argument reinforced an impermissible interpretation of factor (k). *Id.* at 384-86. Significantly, the Court did not discuss the prosecutorial misconduct standard. Instead, as we do here, the Court analyzed how the jury would have interpreted the instruction in light of the prosecutor's argument. *Id.*

[2] Under *Boyde*, we must reverse for instructional error if the challenged instruction is potentially ambiguous and there is a "reasonable likelihood" that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Id.* at 380. We must also determine whether the error was harmless. *Id.* at 380; *Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (per curiam).

1. Ambiguity in unadorned factor (k)

[3] The meaning of the factor (k) model instruction as it existed at the time of Payton's trial was far from clear.[5] That instruction directed the jury to consider "any other circumstance

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[5]In line with the suggestion of the California Supreme Court in *People v. Easley*, 671 P.2d 813 (Cal. 1983), the factor (k) instruction has since been amended to ensure that the jury may consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." *See* CALJIC 8.85(k) (6th ed. 1996); *see Easley*, 671 P.2d at 826 n.10. We refer to the factor (k) instruction as it existed prior to this amendment as "unadorned."

which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3. We "approach jury instructions in the same way a jury would — with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' " *Penry v. Johnson,* 532 U.S. 782, 800 (2001) (quoting *Boyde*, 494 U.S. at 381). Most naturally read, the phrase "extenuates the gravity of the crime" refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.[6] Certainly, the prosecutor's interpretation of this factor as excluding post-crime evidence bolsters the conclusion that the jury instruction was ambiguous in its application to Payton's mitigating circumstances.

The year after the jury announced Payton's death sentence, the California Supreme Court recognized the potential for jury confusion inherent in the wording of factor (k). *People v. Easley*, 671 P.2d 813, 825-26 & n.10 (Cal. 1983). The court acknowledged that there was some force to the argument that a jury might reasonably construe the text of the instruction "to permit consideration only of circumstances that relate to the 'gravity *of the crime*' and not of circumstances that relate to the general character, family background or other aspects *of the defendant.*" *Id.* at 825-26.

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[6]The dissent casts Payton's religious beliefs as an overnight occurrence manufactured for the occasion, stating that the jury heard evidence of Payton's religious conversion "after Payton was apprehended for raping and murdering one individual and attempting to murder two others." *Infra*, at 10782. In fact, a year and nine months spanned the date of the crime and the date of Payton's death sentence, during which Payton's conversion and religious works took place.

The United States Supreme Court held that the factor (k) instruction was not ambiguous as applied to pre-crime background and character evidence as long as the trial court provided clarification of its meaning.[7] *Boyde*, 494 U.S. at 381-82 n.5. The Court held that factor (k) passed constitutional muster because there was no "reasonable likelihood" that the jury was misled into believing it could not consider Boyde's mitigating evidence. *Id.* at 381.

Boyde did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which "more readily fits within factor (k)."[8] *Payton*, 258 F.3d at 928 (Hawkins, J., dissenting). Significantly, *Boyde* distinguished the pre-crime evidence at issue there from evidence — such as Payton's — that "pertain[ed] to prison behavior after the crime for which he was sentenced to death." *Boyde* at 382 n.5.

[4] Unlike the pre-crime evidence in *Boyde*, post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned factor (k) instruction.

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[7]The trial court in *Boyde* defined the term "extenuate" to mean "to lessen the seriousness of the crime as by giving an excuse." *Id.* at 381.

[8]In *Babbitt v. Calderon*, 151 F.3d 1170, 1178-79 (9th Cir. 1998), reviewing the application of the factor (k) instruction to evidence of Babbitt's background, we noted the Supreme Court's holding in *Boyde* that the instruction did not mislead the jury to exclude consideration of Boyde's background and character evidence. *Babbitt* did not address the issue, squarely presented here, of the applicability of the factor (k) instruction to post-crime evidence.

Mitigation evidence occurring after the crime cannot possibly "extenuate the gravity of the crime." Because the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper*'s requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty. *See* 476 U.S. at 5. Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence.

2. The conflicting legal arguments of counsel

[5] The trial court's failure to correct the prosecutor's erroneous interpretation of that instruction, by compounding the potential for confusion inherent in the text of the factor (k) instruction, roots more deeply our conclusion that there was constitutional error. There is no dispute that the prosecutor impermissibly narrowed the scope of factor (k) when he argued to the jurors that the factor did not "refer to anything after" the crime "or later" and that they should not consider Payton's evidence in mitigation. *See Payton*, 839 P.2d at 1048 ("It is true that the prosecutor during closing argument suggested a narrow and incorrect interpretation of factor (k)."); *see also Payton*, 258 F.3d at 916 ("In this case, there is no question that the prosecutor misstated what factor (k) refers to.").

The prosecutor's statements further distinguish this case from *Boyde*. The prosecutor in *Boyde* "never suggested that the background and character evidence could not be considered." 494 U.S. at 385. In contrast, the prosecutor here told the jurors that the statutory list of factors precluded them from considering the *only* mitigating evidence Payton presented — evidence of a post-crime religious conversion and its positive effects on other inmates and the administration of the jail. When a natural reading of the unadorned factor (k) instruction already favored the prosecutor's stance, defense counsel faced an imposing hurdle to convince the jury of the proper interpretation.

3. The absence of instruction from the trial court

We recognize that arguments of counsel generally carry less weight with a jury than instructions from the trial court. *Boyde*, 494 U.S. at 384. The trial court, however, did nothing to level this uneven playing field. Over the objection of Payton's counsel, the trial court decided to allow each attorney to argue his own legal interpretation to the jury, rather than instructing the jury as to which interpretation was correct. In contrast, the Supreme Court's holding in *Boyde* that the jury understood the scope of factor (k) relied heavily on the trial court's clarifying instruction allowing the jury to consider "*any other circumstance* that might excuse the crime," which included the defendant's background and character. *Id.* at 381-82 & n.5 (emphasis in original).

[6] Here, the only "curative" instruction given was that the comments by the prosecutor and the defense counsel were not evidence. The ineffectiveness of the trial court's instruction is clear from the prosecutor's return, after the trial court's admonition, to his argument to the jury that factor (k) did not encompass Payton's mitigating evidence.

[7] Nor did the trial court's final instructions to the jury cure the error here. Before the jury retired to deliberate, as noted, the trial court instructed:

> In determining the penalty to be imposed on thedefendant, you shall consider all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed.* You shall consider, take into account and be guided by the following factors, *if applicable* . . . .

(emphasis added). The trial court's directive to "consider all of the evidence" failed to correct the prosecutor's error. In the

same breath, the trial court stated that the jury should consider all the evidence "except as you may be hereafter instructed" and then instructed them to be "guided by" the eleven-factor test. Thus, the trial court confined the jury's consideration of the evidence to the multi-factor test that the prosecutor had just declared did not allow consideration of Payton's extensive mitigating evidence. The judge then instructed the jury that it was to apply the factors only "if applicable."

[8] In effect, the court's instruction delegated to the jury the legal question whether factor (k) allowed consideration of Payton's mitigating evidence. Nothing prevented the jury from refusing to consider Payton's mitigating evidence and thereby reaching an unconstitutional result. *See Eddings,* 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration."). When "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). We cannot expect a jury to reach the constitutionally correct conclusion that the multi-factor instruction compelled consideration of Payton's mitigating evidence when the jury must overcome both the text of factor (k) and the facially reasonable argument of the prosecutor. These circumstances likely stripped Payton of his only defense to the imposition of the death penalty.

[9] Thus, Payton has satisfied *Boyde*'s standard requiring that he establish that there was a reasonable likelihood that the jury applied the instruction in a way that prevented consideration of his mitigating evidence. *Boyde* does not require that Payton show that "the jury was more likely than not to have been impermissibly inhibited by the instruction." *Boyde,* 494 U.S. at 380. However, Payton's death sentence would be constitutional "if there is only a possibility of such an

inhibition." *Id.* In determining whether more than a "possibility" of inhibition existed, we do not limit our inquiry to how "a single hypothetical 'reasonable' juror could or might have interpreted the instruction." *Id.* The claimed error must amount to more than speculation about the jury's understanding of the instruction. *Id.*

Payton's claim is more than speculative. Compounding the nebulous terms of the unadorned factor (k) instruction were the prosecutor's erroneous argument and the trial court's silence as to the jury's constitutional obligation to consider all of the mitigating evidence. In *Easley*, the California Supreme Court stated that trial courts should, in instructing jurors on factor (k), tell juries that they can consider any aspect of the defendant's character or record. 671 P.2d at 826 n.10. Here, defense counsel asked for an instruction similarly clarifying the breadth of the scope of factor (k). Despite agreeing that it was a "catch-all provision," the trial judge refused. Instead, the jury was given the unadorned factor (k) instruction without any explanation by the court as to what was appropriate to consider under factor (k). In sum, the jury received the multi-factor instruction, including factor (k), on the same plate with the contentions of the prosecutor and defense counsel as to its applicability, and without further guidance from the trial court.

Penry v. Johnson, 532 U.S. 782 (2001), confirms our conclusion that there was a reasonable likelihood that the jury did not consider Payton's mitigating evidence. There, the Supreme Court condemned a similar tripartite error consisting of a jury instruction that excluded consideration of Penry's mitigating evidence, the prosecutor's exhortation to the effect that the jury should follow that instruction, and the trial court's failure to provide a "vehicle" for the jury to "express[ ] the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 804. In emphasizing that the

jury must be able to "consider and give effect to a defendant's mitigating evidence in imposing sentence," the Court stated:

> [I]t is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.

Id. at 797 (internal quotations, brackets, italics, and citations omitted).

[10] *Penry* reminds us that we presume that jurors follow their instructions.[9] *Id.* at 799. When the effect of a mitigation instruction, viewed in the full context of the trial, is to confuse or mislead the jury in its duty to consider all relevant mitigation evidence, there has been constitutional error. By labeling the prosecutor's incorrect contentions mere "argument," the trial court not only failed to correct a critical misstatement of law but also effectively instructed the jury *to consider* the prosecutor's

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[9]The dissent's reliance on *Weeks v. Angelone*, 528 U.S. 225 (2000) is misplaced. In *Weeks*, the Supreme Court considered an instruction that it had previously determined was unambiguous standing alone. *Id.* at 231 (citing *Buchanan v. Angelone*, 522 U.S. 269 (1998)). In contrast, the Supreme Court in *Boyde* determined that the factor (k) instruction was constitutional by relying heavily on the trial judge's clarifying instruction to the jury about its meaning. Moreover, in *Weeks*, the Supreme Court emphasized that the trial judge had separately instructed the jury to consider all mitigating circumstances. This is almost exactly the instruction that Payton's defense counsel requested and that the trial judge rejected. *Id.* at 231-32.

erroneous legal position. *See Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985). This directive is sufficient to establish constitutional error.

C. Harmless error

Having concluded that an error of constitutional magnitude impacted the penalty phase of Payton's trial, we turn to whether that error was nevertheless harmless. We hold that the error had a "substantial and injurious effect or influence" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Our jurisprudence is divided as to whether the petitioner or the state, or neither, bears responsibility for demonstrating the significance of the error under the *Brecht/O'Neal* harmlessness standard. *Compare Rodriguez v. Marshall*, 125 F.3d 739, 744 (9th Cir. 1997) (stating that petitioner bears the burden of showing harm); *Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997) (same); *with Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (as amended) (noting that the state bears the burden of showing harmlessness); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001) (same); *and with Gray v. Klauser*, 282 F.3d 633, 651 (9th Cir. 2002); *Thompson*, 74 F.3d at 1575 (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect).[10]

It is clear from *O'Neal* that the petitioner does not bear the burden of showing harm. 513 U.S. 437-45. Because the harmless error analysis is a purely legal question that lies outside the realm of fact-finding, we dispense with burdens of

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[10]This inconsistency was previously noted in *Mancuso v. Olivarez*, 282 F.3d 728, 737 n.4 (9th Cir.), *as amended* ___ F.3d ___ (2002), and the court there attempted to clarify the issue. Our analysis here is not inconsistent with *Mancuso*.

proof and presumptions. *See O'Neal*, 513 U.S. at 437 (explaining that the court must determine whether the error affected the judgment "without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial" (quoting R. Traynor, The Riddle of Harmless Error 26 (1970)). *O'Neal* directs us to ask a "conceptually clearer" question in reviewing the record in a habeas case: "Do I, the judge, think that the error substantially influenced the jury's decision?" 513 U.S. at 436.

In the course of this inquiry, it is the State that bears the "risk of doubt." *Id.* at 438. When issues arise during our analysis which create uncertainty, the petitioner is entitled to the benefit of the doubt. *See id.* at 436, 438-43. At the close of our inquiry, we step back to determine where we are on the spectrum of certainty about the harmlessness of the constitutional error. If we are convinced that "the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* at 437 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). If, on the other hand, we are not fairly assured that there was no effect on the verdict, we must reverse. *Id.*; *Gray*, 282 F.3d at 651. In the "narrow circumstance" in which we are in "grave doubt" as to the effect of the constitutional error, we must assume that there was such an effect, and grant the petition. *O'Neal*, 513 U.S. at 437; *see also Thompson,* 74 F.3d at 1575.

Thus, we look to the State to instill in us a "fair assurance" that there was no effect on the verdict. *Gray*, 282 F.3d at 651; *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992); *see also O'Neal,* 513 U.S. at 443 ("[T]he State normally bears responsibility for the error that infected the initial trial."). Only if the State has persuaded us that there was no substantial and injurious effect on the verdict do we find the error harmless.

This framework is faithful to the balance the Supreme Court has struck between concerns of federal-state comity and finality in state criminal trials, and the irreversible harm caused by an execution resulting from an unconstitutional error. In weighing these concerns in a non-capital case, the Supreme Court has stated:

> [T]he number of acquittals wrongly caused by grant of the writ and delayed retrial (the most serious harm affecting the State's legitimate interests) will be small when compared with the number of persons whom this opposite rule (denying the writ) would wrongly imprison or execute. On balance, we must doubt that the law of habeas corpus would hold many people in prison "in violation of the Constitution," for fear that otherwise a smaller number, not so held, may eventually go free.

O'Neal, 513 U.S. at 443. Placing the "risk of doubt" on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error. *Id.* at 437-44; *United States v. Olano*, 507 U.S. 725, 741 (1993) (stating that the government bears the "burden of showing the absence of prejudice"); *Chapman v. California*, 386 U.S. 18, 24 (1967) (noting that "the original common-law harmless-error rule put the burden on the beneficiary of the error . . . to prove that there was no injury"). *Kotteakos*, which articulated the harmlessness standard that *Brecht* later adopted and that we now apply, "places the burden on prosecutors to explain why those errors were harmless." *O'Neal,* 513 U.S. at 438-39 (quoting *Brecht,* 507 U.S. at 640 (Stevens, J., concurring) (citing *Kotteakos*, 328 U.S. at 760)).[11]

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[11]To the extent that they are inconsistent with this opinion, we overrule the statements in *Rodriguez*, 125 F.3d at

Considering the record before us, the State has not provided us with a "fair assurance" that the error did not prejudice the penalty phase of Payton's trial. *O'Neal,* 513 U.S. at 437-38; *Gray*, 282 F.3d at 651. On one side of the balance sheet is Respondent's evidence of aggravating circumstances. There is no question that this was a brutal crime. The prosecution introduced eyewitnesses to Payton's actions, testimony as to his motives and character, and forensic and other evidence to demonstrate to the jury the devastating effects of the crime.

It is the other side of the balance sheet that undermines any assurance that the jury's verdict was not affected. As required by California Penal Code § 190.3, the trial court further instructed the jury that "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death." We have determined that there is a reasonable likelihood that the jury accepted the prosecutor's statement of the law rather than the defense counsel's and that it therefore failed to consider the only evidence offered in mitigation of the death penalty. That left the jury bereft of any countervailing evidence to weigh against the prosecution's evidence of aggravating circumstances.

We cannot know whether the jury would have returned a verdict of life or of death had it been properly instructed. Payton's extensive evidence of his conversion to Christianity, positive influence on other inmates, and other good works in jail were offered to evoke to the jury his potential for

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744; *Franklin*, 122 F.3d at 1273; and *Thomas v. Hubbard*, 273 F.3d 1164, 1170 (9th Cir. 2002) (as amended) that appear to place the burden on the petitioner to establish that there was harm under *Brecht.*

rehabilitation.[12] If the jury had been inclined to weigh favorably evidence of redeeming features of his character or his conduct while in custody pending trial, it would have felt constrained by law from considering that evidence. Without Payton's mitigating evidence, the jury was bound by California Penal Code § 190.3 to impose a death sentence. *See Easley*, 671 P.2d at 827.

[11] Having pondered "all that happened without stripping the erroneous action from the whole," we do not arrive at a fair assurance that the error was harmless. *Gray*, 282 F.3d at 651 (*quoting O'Neal*, 513 U.S. at 437). As we have previously stated, "[b]ecause a death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case." *Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000); *see also Mills v. Maryland*, 486 U.S. 367, 376 (1988)

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[12]The dissent questions the sincerity of Payton's religious beliefs, calling his conversion a "miracle on the cellblock" and a "fortuitous epiphany." *Infra*, at 10787, 10793. The testimony in mitigation permits a different inference. Payton's pastor testified that as a high school student Payton involved himself with a church group for several years. Reinitiating contact with the church after his arrest is consistent with his actions as a high school youth. Ultimately, resolving the question of the depth of Payton's beliefs demands the kind of sifting and weighing of the evidence that is the jury's exclusive realm. *Skipper*, 476 U.S. at 9 (remanding for new penalty phase trial when exclusion of post-crime mitigating evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender"). We steer clear of determining the value of the evidence in favor of ensuring that the jury had the opportunity to decide for itself whether Payton's religious beliefs were merely "fortuitous."

("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."). Far from a fair assurance that the error was harmless, the "possible jury confusion" arising from the trial court instruction leaves us in "grave doubt about the likely effect of [the] error on the jury's verdict." *O'Neal,* 513 U.S. at 435; *see also Fisher*, 263 F.3d at 917-18. We conclude, therefore, that the instructional error had a "substantial and injurious effect or influence on the jury's verdict" that necessitates a new penalty phase trial. *See Coleman*, 525 U.S. at 147. Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death.

Conclusion

Accordingly, we AFFIRM the judgment of the district court granting Respondent's motion for summary judgment as to all claims except Claim IVB, item 3 of the Petition for Habeas Corpus, and granting the writ of habeas corpus as to the penalty phase of the trial.

AFFIRMED.

TALLMAN, Circuit Judge, concurring in part and dissenting in part, joined by KOZINSKI, TROTT, FERNANDEZ & T.G. NELSON, Circuit Judges:

I respectfully dissent from most of the court's opinion. In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court upheld against an Eighth Amendment challenge the same CALJIC jury instruction employed in Payton's penalty trial. I do not believe the result should be any different in this case because it is not reasonably likely that the prosecutor's incorrect remarks led jurors to understand the instructions as precluding consideration of all of the defendant's mitigating evidence, *i.e.*, virtually the entire penalty phase case. Moreover, if there was an error, it was surely harmless.

I base my conclusion on the following factors: (1) The jury was properly admonished by the trial judge on the point that "counsel's arguments are not evidence and must be judged in the context in which they are made" when the defense objected to the prosecutor's error and moved for a mistrial; (2) the prosecutor later implicitly conceded in his closing argument that the jury could consider the defendant's claimed religious conversion although he argued it was entitled to very little weight; (3) defense counsel's closing argument cured any misimpression the prosecutor might have left; (4) no rebuttal argument was permitted by the trial court; and (5) if the narrow view of Cal. Penal Code § 190.3(k) urged by the prosecutor had been accepted by the jury it would have necessarily had to ignore all of the penalty phase evidence except for 11 pages of testimony by prosecution witnesses.

In addition, we must remember that Payton's jailhouse conversion was heard by the jury in its proper context — after Payton was apprehended for raping and murdering one individual and attempting to murder two others. The court's

opinion makes much of one jury instruction and a few erroneous comments by the prosecutor. But it was Payton's crime — barely described by the majority — for which the jury sentenced him to death.

In the wee hours of the morning of May 26, 1980, William Charles Payton arrived at the Garden Grove, California, home of Patricia Pensinger. Payton, who had once been a boarder in Pensinger's home, found Pensinger awake and working on a crossword puzzle in the kitchen. He informed her he was experiencing car trouble. Pensinger graciously welcomed Payton into her home and offered him some beer, which he drank while talking with Pensinger until about 4:50 a.m. During their conversation, Pamela Montgomery, a boarder temporarily residing at Pensinger's home, entered the kitchen. Pensinger introduced her to Payton. Montgomery, who was staying with Pensinger while her husband was on duty with the National Guard, filled a glass with water, then left the kitchen and returned to her bedroom. Payton asked Pensinger if he could sleep on the living room couch and Pensinger said he could.

While everyone else in the house was fast asleep, Payton repaid Pensinger for her hospitality by waking her with two blows to her back, stabbing her 40 times on her face, neck, back and chest, and stabbing her ten-year-old son, Blaine, 23 times in the face, neck and back. Miraculously, both Pensinger and her son survived. Pamela Montgomery was not so lucky. Her body was found after Payton fled the Pensinger residence. He returned to his own home where his wife saw him covered in blood. Forensic evidence suggested that Payton stabbed Mrs. Montgomery 12 times either during sexual intercourse, or that he raped her while she lay comatose from her wounds bleeding to death.

Payton's trial counsel conducted an investigation into Payton's background and the events of the night of the murder. He consulted with mental health experts. Defense counsel elected not to call any witnesses during the guilt phase of trial, and the jury convicted Payton on all counts. The jury found the special circumstance that Payton had committed aggravated murder while engaged in the commission of rape or attempted commission of rape.

During the penalty phase, the prosecution presented evidence concerning Payton's jailhouse admission that he had a "severe problem with sex and women," and that he would "stab them and rape them." He also admitted that he had previously stabbed a former girlfriend (who survived to testify against him). Defense counsel responded by trotting out eight witnesses to testify that Payton had made a genuine commitment to God after being jailed for the commission of the crimes and while awaiting trial. "Their testimony, taken as a whole, tended to show that Payton had been 'born again,' made a sincere commitment to God, and was performing good works in jail." Slip op. at 10763.

During closing argument, the prosecutor stated that he did not believe Payton's post-crime religious conversion was "really applicable" or "comes in under any of the eleven [mitigating] factors." Although the last factor, factor (k), was designed to be a catchall and covered "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," Cal. Penal Code § 190.3(k) (1978), the prosecutor contended that factor (k) "doesn't refer to anything after the fact or later."

The judge admonished the jurors that the arguments of counsel did not constitute evidence and that the jury must consider all of the evidence when determining Payton's penalty. The jury decided that Payton should be put to death.

The California Supreme Court affirmed the sentence five to two. *See People v. Payton*, 839 P.2d 1035 (Cal. 1992), *cert. denied*, 510 U.S. 1040 (1994). Our three-judge panel held that the federal writ of habeas should not issue in this case. But our court en banc today, by a slim majority, refuses to recognize the jury verdict, a verdict that was upheld by the California Supreme Court, in Payton's penalty phase trial, reasoning that (1) the Supreme Court's decision in *Boyde* does not dictate the outcome where the defendant sought to admit solely post-crime evidence; (2) the process that the Supreme Court adopted in *Boyde* for evaluating instructional error leads to the conclusion that there was constitutional error in this case; and (3) the error was not harmless.

Because I disagree with these conclusions and the court's ultimate holding, I respectfully dissent.

I

I concur in the court's decision not to disturb the underlying conviction and to reject most of Payton's challenges to both his conviction and sentence. Slip op. at 10761-62 n.1. None of our eleven judges supports Payton's argument that he received ineffective assistance of counsel at either the guilt or penalty stages of trial. Even though defense counsel did not present any witnesses, not a single member of this en banc panel believes that Payton was prejudiced with respect to the guilt phase in light of the overwhelming evidence against him. Nor does a single judge believe "there is a reasonable probability that, absent [any errors of defense counsel], the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

II

The court nonetheless affirms the district court's grant of a writ of habeas corpus based on instructional error, holding that there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the "consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380; slip op. at 10767. The court's opinion correctly notes that a year *after* the jury announced Payton's death sentence, the California Supreme Court acknowledged that factor (k) might cause juror confusion. *See People v. Easley*, 671 P.2d 813, 825-26 & n.10 (Cal. 1983); slip op. at 10770.[1] Our opinion also acknowledges that the United States Supreme Court examined this exact same instruction in a capital case in *Boyde* and held that the language of the instruction did not violate the Eighth Amendment, *see* 494 U.S. at 386, and that there was not a "reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Id.* at 380.

Our court first tries to distinguish Payton's case by limiting the holding in *Boyde* to the conclusion that "the factor (k) instruction was not ambiguous as applied to *pre-crime* background and character evidence as long as the trial court

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[1]Though noting the potential for confusion in the instruction itself, the California Supreme Court reversed the death sentence in *Easley* because "the trial court not only failed affirmatively to advise the jury that it *could* consider as a mitigating factor any aspect of the defendant's character or background, but it expressly — and inaccurately — informed the jury that it *must not* be influenced by sympathy or pity for the defendant." 671 P.2d at 826 (emphasis in original). The trial court did not commit those errors at Payton's penalty phase trial, and, in fact, specifically told the jury to consider all of the evidence.

provided clarification of its meaning." Slip op. at 10770 (emphasis added). *Boyde* should not be read so narrowly. The central issue in *Boyde*, as in Payton's case, as in any challenge to factor (k), is whether factor (k)'s language limits the jury to consideration of evidence only directly related to the crime. The Supreme Court emphatically rejected such a reading. *See Boyde*, 494 U.S. at 382 ("The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.") (emphasis in original); *see also id.* at 383 (finding it "improbable that jurors would arrive at an interpretation that [factor (k)] precludes consideration of all non-crime-related evidence").[2]

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[2]"Extenuate" is defined "[t]o make less severe; to mitigate." BLACK'S LAW DICTIONARY 604 (7th ed. 1999). "Mitigate" is defined as "[t]o make less severe or intense." *Id.* at 1018. It is difficult to argue that a murder is less severe because of either pre-crime or post-crime circumstances pertaining to the murderer. The victim is dead in either case. But under Cal. Penal Code § 190.3, the defense is allowed to present whatever constitutionally relevant evidence it wants to persuade the jury to spare the defendant's life, and the jury may choose to spare the defendant's life based on any evidence it concludes "extenuates the gravity of the crime" even though it is "not a legal excuse for the crime" and even though it does not literally make the crime any less "severe." As the Supreme Court stated in *Skipper v. South Carolina*, 476 U.S. 1 (1986), "[a]lthough it is true that [favorable] inferences [drawn from the defendant's good behavior while in prison] would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve as a basis for a sentence less than death." *Id.* at 4-5 (citation and quotation

Just because Boyde's "disadvantaged background and his character strengths in the face of those difficulties," 494 U.S. at 382 n.5, was the evidence in question in that case does not mean post-crime evidence should be viewed differently. Once one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k).

Moreover, as both the Supreme Court in *Boyde* and our court's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what defense counsel tried to show during the penalty phase — that Payton had undergone a character transformation after being jailed. He had turned away from his former evil ways and toward God; he no longer sought to harm and abuse, stab and rape women; instead, he sought to help his fellow male inmates. He presented a significant amount of evidence to that effect, and the jury listened to it. We must presume the jury considered it. Unfortunately for Payton, the jury either did not believe this miracle on the cellblock or did not value it much in comparison to the horrific crimes he committed. The court seems unwilling to believe that jurors could easily apply their own common sense in considering what weight to give this defense evidence.

III

Assuming arguendo that *Boyde's* holding must be limited to pre-crime evidence so that the case left open "the question whether, on its face, the unadorned factor (k) instruction is

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omitted). The problem here is that the evidence offered by Payton was unlikely to persuade a jury that it mitigated the awful things that he had done.

unconstitutionally ambiguous as applied to post-crime evidence[,]" slip op. at 10770, I still would not find constitutional error in this case.

Boyde tells us that when evaluating "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" we must examine the instruction in "the context of the proceedings." 494 U.S. at 380, 383. The defense presented no witnesses during the guilt phase of trial, but eight witnesses — Payton's mother, his pastor, the director of a religious organization that ministered to prisoners, a deputy sheriff, and four inmates — testified during the penalty phase. These individuals testified that after his arrest Payton had genuinely committed himself to God, and, as a result, he had a calming effect on other prisoners.[3]

In closing argument the prosecutor incorrectly stated that factor (k) "doesn't refer to anything after the fact or later," whereupon the trial court immediately admonished the jury that comments made by counsel were argument, not evidence. I do not understand why we should not accord this standard admonishment the respect we normally afford it in non-capital cases. Juries are presumed to follow such admonitions absent specific proof that jurors did not. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The prosecutor's arguments were also of concern in *Boyde*, and the Supreme Court stated:

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[3]No defense witnesses were excluded from testifying on Payton's behalf, thus distinguishing this case from *Skipper v. South Carolina*, where the trial court excluded as irrelevant witnesses who would have testified that the defendant had "made a good adjustment" while in prison. 476 U.S. at 3.

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Boyde, 494 U.S. at 384-85 (internal citations omitted).

The prosecutor erred again by arguing that the jury had not heard "any legal evidence in mitigation," but for the majority of his closing, the prosecutor did what he should have done and argued not that jurors could not consider Payton's religious conversion but that they should not *value* it much. The prosecutor argued that the religious conversion would not seem to "lessen the gravity of the offense"; that the defense evidence was offered "to win [the jury's] sympathy"; that Payton's new-found religion could not undo his bad acts from the past; and that while Payton appealed to the jurors' mercy, he had not shown any to his victims. The prosecutor also implicitly acknowledged that the evidence presented by the defense counted for *something* when he stated "[i]f you want to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery."

In its closing, the defense stressed that the jury certainly could consider Payton's post-crime religion under factor (k) and

argued "[i]f that's not applicable and that therefore all the evidence we presented is not applicable, why didn't we hear any objections to its relevance?"[4] When the prosecutor objected at this point, the court said it would not repeat its admonition. Nor did it allow the prosecution opportunity for closing rebuttal argument.

When delivering the jury instructions, the trial court stated:

> In determining the penalty to be imposed on the defendant, you shall consider *all of the evidence* which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . . .
>
> (k), Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

(emphasis added).

The court apparently believes the key language in that instruction is not "all of the evidence" but rather "as you may be hereafter instructed" and holds that the combination of this instruction with the prosecutor's error left the jury on its own to determine whether or not to consider Payton's post-crime

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[4]Defense counsel's rhetorical question speaks for itself. Why, indeed, would the prosecutor not object to the post-crime evidence if it was entirely irrelevant? Even more to the point, why would the trial judge compel the jurors to sit through a parade of eight witnesses if jurors were not allowed to consider their testimony?

religious conversion. Slip op. at 10773. This hardly seems likely. The jurors heard eight witnesses testify as to Payton's religious conversion; they were told arguments by counsel were not evidence; they were told to consider *all of the evidence*; and they were not told to ignore post-crime evidence, or all of the defendant's evidence. Thus, the instruction effectively told jurors they could consider post-crime evidence under factor (k).[5]

We presume the jury followed the court's instructions and considered all of the evidence presented at both phases of trial. *See Weeks*, 528 U.S. at 234. One may disagree with the jury's decision, but it is not reasonable to contend that the jury was not in the proper position to render a fully informed verdict. The

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[5]The court in this case accepts what the Supreme Court rejected in *Weeks v. Angelone*, another capital case in which the jury instructions might not have been as clear as they could have been. In that case, the jury asked the judge whether it had to choose the death penalty if it found that the defendant met one of the criteria that made the death penalty an option. The trial court referred the jury to an instruction that stated that "[i]f the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives [that made the death penalty an option], then you shall fix the punishment of the defendant at life imprisonment." 528 U.S. at 229-30. The Supreme Court rejected the argument that the trial court had a duty to inform the jury (in part because defense counsel did so in closing argument) that even if it found the defendant eligible for the death penalty it could impose a penalty of life imprisonment. It affirmed the denial of the writ of habeas corpus, stating, "[a]t best, petitioner has demonstrated only that there exists a slight *possibility* that the jury considered itself precluded from considering mitigating evidence. Such a demonstration is insufficient to prove a constitutional violation under *Boyde*, which requires the showing of a reasonable *likelihood* that the jury felt so restrained." *Id.* at 236.

effect, if any, of a jailhouse religious conversion on a defendant's character is a question readily discernible by jurors, who are probably better suited to weigh its value in mitigation than are judges.

IV

Even if we were to assume that an instructional error rising to the level of a constitutional violation occurred in Payton's case, his is not the case to overturn a jury's sentence, one that has been affirmed by the California Supreme Court.

Before conducting harmless error analysis, however, I must fault our court's approach for determining whether an error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). While the court initially states that "the harmless error analysis is a purely legal question that lies outside the realm of fact-finding [so that] we dispense with burdens of proof and presumptions[,]" slip op. at 10777, it quickly forgets this and places the burden on the state. Slip op. at 10778 ("Placing the 'risk of doubt' on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error.").

While noting that our prior decisions have not been a model of clarity or consistency, we recently clarified that "the reviewing court must determine independently whether a trial error had a substantial and injurious effect, without consideration of burdens of proof." *Mancuso v. Olivarez*, 292 F.3d 939, 950 n.4 (9th Cir. 2002) (as amended). It is true that "[w]hen a federal judge in a habeas proceeding is *in grave doubt* about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must

win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (emphasis added). But "grave doubt[ ] is unusual," *id.* at 435; *normally*, there are no burdens. *See id.* In most cases, the judge simply asks, "Do I, the judge, think that the error substantially influenced the jury's decision?" *Id.* at 436.

Whatever problems previously existed with our case law, the court today makes them worse by overruling only those that placed a burden on the petitioner, slip op. at 10778-79 n.11, without also overruling those that placed a burden on the state absent grave doubt. *See, e.g., Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (as amended); *Fisher v. Roe*, 263 F.3d 906, 917 (9th Cir. 2001). Only where there is grave doubt do we get to burdens. And there is no need for that in this case.

As previously noted, no judge finds merit in the ineffective assistance of counsel claims even though defense counsel presented no witnesses during the guilt phase and the eight witnesses who testified during the penalty phase focused on Payton's post-crime conversion. While the court uses this to distinguish *Boyde* in Payton's favor by concluding that there is a reasonable likelihood jurors did not consider the evidence offered on Payton's behalf, what it really indicates is that the defense had hardly anything to offer that could have persuaded a jury to spare Payton's life. William Charles Payton did not suffer from mental illness; he was not "made bad" by his upbringing; he was not a generally good person who did one heinous act out of character; and he was ably defended by competent counsel. On this record, the jury could easily find that William Charles Payton was a vile human being who chose a despicable path in life that culminated in a series of heinous crimes on the morning of May 26, 1980.

Had Payton changed by the time of his trial and sentencing? Who knows? We do know that the jury heard evidence of his post-crime religious conversion. The

conversion may have counted for something, but it was up to a jury two decades ago to decide how to value his fortuitous epiphany. Certainly, there might have been substantial doubt concerning Payton's sincerity given the timing of his religious conversion, but even if the commitment were sincere, the jury may very well have concluded that such matters concerned Payton's soul, not his life.

The jury heard all of the evidence and determined that Payton should forfeit his life for the life he took and the injuries he inflicted on the surviving victims, who must live with the horrible memories of what he did to them. I believe Payton's jury, unlike a majority of the court today, had the ability to make a fully informed and incredibly difficult decision as to whether an individual who has been found guilty of a capital offense deserves to die for the awful crimes he committed.[6]

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[6]Rather amazingly, the court apparently believes that it is upholding the right of jurors to determine whether the sentence of death is to be imposed and that the dissent is just second-guessing the genuineness of Payton's religious conversion. Slip op. at 10779-80 n.12. Nothing could be further from the truth. I fully support the jury verdict in this case and would reinstate it as our three-judge panel did. It is the majority that is recasting Payton's religious commitment — sifting through the record to discover that in high school Payton was involved with a church group, thus apparently indicating a lifelong commitment to a religious way of life. Perhaps he was an otherwise pious man who occasionally lapsed to the dark side. The jury applied its common sense in judging the merits of Payton's defense. It is the court's opinion that is bent on disregarding the penalty that the jury by its verdict believed was appropriate because my colleagues disagree with the jury's decision.

It is true that in death penalty cases we ask for a higher standard to affirm the sentence, *see Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir. 2000), but that does not mean that a trial must be error-free. No trial is or can ever be perfect; and we can never know for certain that a jury considered all the evidence in reaching a verdict. We try to assure they do and the trial court did so here.

Our job today is to ask: "Do [we, as judges], think that the error substantially influenced the jury's decision?" *O'Neal*, 513 U.S. at 436. Common sense tells us the answer is no. Abstract legal discussions are important in the development of the law, but so is the ability to look at the impact of those abstract decisions in the context of the real world. Any legal errors in this case were harmless in relation to the acts committed by the man who stood before the jury and asked it to mitigate his sentence based solely on his change of heart after he was caught.

V

I fear that as we wrestle with the fate of a defendant facing the ultimate penalty of death, we have elevated form over substance and cloaked our habeas decision in the mantle of a federal constitutional requirement when the Supreme Court told us in *Boyde* the Constitution contemplates no such thing. In the process, one wonders whether our court has lost its conscience and no longer listens to the silent screams of the victims, who are also entitled to justice; nor considers the impact of its decisions on the safety of our communities, which are equally entitled to protection from recidivists like William Charles Payton. I would reverse the district court's decision to issue the writ of habeas corpus and reinstate the holding as set forth in the opinion of the California Supreme Court and the decision of our three-judge panel.

APPENDIX D

APPENDIX D

[Filed August 2, 2001]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Acting Warden, of California State Prison at San Quentin *Respondent-Appellant.*	No. 00-99000 D.C. No. CV-94-04779-R

WILLIAM CHARLES PAYTON, *Petitioner-Appellee*, v. JEANNE WOODFORD, Acting Warden, of California State Prison at San Quentin *Respondent-Appellant.*	No. 00-99003 D.C. No. CV-94-04779-R OPINION

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted En Banc
May 10, 2001----Pasadena, California

Filed August 2, 2001

Before: Pamela Ann Rymer, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Rymer;
Partial Concurrence and Partial Dissent by Judge Hawkins

COUNSEL

Nancy Palmieri, Deputy Attorney General, San Diego, California, for the respondent-appellant/cross-appellee.

Rosalie L Rakoff, Santa Monica, California, for the petitioner-appellee/cross-appellant

Dean R. Gits, Sant Monica, California, for the petitioner-appellee/cross-appellant.

OPINION

RYMER, Circuit Judge:

William Charles Payton was convicted in 1982 of the rape and murder of Pamela Montgomery, and the attempted murders of Patricia Pensinger and her ten-year-old son, Blaine. He was sentenced to death. The California Supreme Court affirmed. People v. Payton, 3 Cal.4th 1050, 13 Cal. Rptr. 2d 526 (1992). It found that the prosecutor made an incorrect argument in the penalty phase about "factor (k),"[1] -- that factor (k) does not refer to anything after the fact or later than the crime -- but held that

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[1]Factor (k) is the last of eleven mitigation factors and covers "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k).

the error was harmless as it was not reasonably likely the jurors believed the law required them to disregard Payton's mitigating evidence. Payton filed a petition for habeas corpus in federal district court, which granted the writ on his claim of prosecutorial misconduct. The district court held that the penalty phase was rendered fundamentally unfair by the prosecutor's improper argument regarding the jury's consideration of mitigating evidence. Accordingly, the sentence of death was vacated until the state granted a new penalty trial and, if no retrial was held, Payton was to be sentenced to life imprisonment without the possibility of parole. His convictions for murder, rape, and attempted murder were left standing. The state appealed. We conclude that Payton's due process rights were not violated. It is not reasonably likely that the jury was misled into disregarding Payton's evidence because the prosecutor's incorrect statement was cured by the trial court's admonishment, the prosecutor's discussion of the substance of Payton's mitigating evidence, his concession that there was at least some merit to it, defense counsel's broad reading of factor (k), and the court's instruction that the jury "shall" consider "all" the evidence -- which necessarily included Payton's evidence in mitigation.

Payton cross-appealed. He sought a certificate of probable cause (CPC) on January 14, 2000, which the district court granted on February 16. However, on April 26, the Supreme Court held in Slack v. McDaniel, 529 U.S. 473 (2000), that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs any habeas appeal commenced after AEDPA's effective date, April 24, 1996, without regard to when the petition was filed. Consequently, Payton needs a certificate of appealability (COA) rather than a CPC for this court to have jurisdiction. Because Payton could not have known that a COA rather than a CPC was required,"we treat the petitioner's notice of appeal as a request for a COA on the issues raised in the briefs, and we grant a COA on those issues

as to which the petitioner has made the requisite `substantial showing of the denial of a constitutional right.' " Morris v. Woodford, 229 F.3d 775, 779 (9th Cir. 2000) (quoting Schell v. Witek, 218 F.3d 1017, 1021 n.4 (9th Cir. 2000)). We believe Payton has made such a showing and so grant a COA on the issues raised in his opening brief, but we agree with the district court on the merits that Payton's conviction must stand.

I

Payton was a former boarder at Patricia Pensinger's home. Around 4:00 A.M. on May 26, 1980, he entered the house through the front door and went to the kitchen. Pensinger was in the kitchen, and Payton told her that he had car troubles. Pensinger offered Payton some beer and the two talked until about 4:50 A.M. Montgomery came to the kitchen to get a drink of water and Pensinger introduced the two, although Montgomery left the kitchen shortly afterwards.

Payton asked if he could sleep on the couch in the living room, and Pensinger said okay. She then went to her bedroom, where Blaine was already asleep.

Pensinger was awaken by blows on her back. When she rolled over, Payton jumped on her and repeatedly stabbed her with a knife, primarily on her face and neck. The attack woke her son who was also stabbed when he tried to help his mother. Payton attempted to stab Pensinger in the abdomen but the knife would not penetrate because the blade had bent. Payton then left the bedroom yelling, "I'm leaving now."

Pensinger and her son tried to escape through the kitchen. But Payton was there. He grabbed another knife and began stabbing Pensinger and her son again, repeatedly. Eventually, others responded to the noise. Payton dropped the second knife and fled.

Both Patricia and Blaine Pensinger survived. In total, Patricia Pensinger suffered 40 stab wounds to her face, neck, back, and chest. Blaine Pensinger suffered 23 stab wounds to his face, neck, and back.

After the police arrived, Montgomery's body was discovered. Montgomery was found lying in a pool of blood on her bedroom floor, wearing only a nightgown that was open in the front. There was blood in the bedroom as well as a nearby bathroom. Underwear was found entwined in a pair of shorts in Montgomery's bed. Saliva and semen that was consistent with Payton's were found on the victim's breast and vaginal area. Montgomery had been stabbed 12 times; 6 of the stab wounds were in a line from Montgomery's stomach to her groin. She died approximately 15 to 30 minutes before she was found.

Payton arrived home at 6:15 A.M. His wife observed that his clothes, face, and hands were covered with blood (some of which was still wet). He had a cut on his index finger, and when he removed his clothes there was a "lot" of blood on his genital area as well as his legs and chest (but not on his pants). He also had fingernail scratches on his back. Payton fled, and was eventually arrested in Florida.

Payton was charged with the first degree murder, Cal. Penal Code § 187, and rape, Cal. Penal Code § 261(2), of Pamela Montgomery, and the attempted murders of Patricia Pensinger and Blaine Pensinger, Cal. Penal Code §§ 664 and 187. Trial counsel, James Merwin, was appointed on December 5, 1980. He and his investigator interviewed Payton's family (who basically painted the picture of an intelligent person raised in a middle-class background), and a couple of people who were at the party where Payton was before the murders (who indicated that he had been drinking and had apparently tried to assault two women sexually while there).

Merwin inherited the opinion of a mental health expert (Dr. Sheffner) retained by his predecessor that recounted Payton's past problems with sexual desires and concluded that Payton's claims of altered state of consciousness did not appear credible. Dr. Sheffner also opined that Payton's claims of amnesia or blackouts do not make medical sense or fit into any psychiatric-neurological pattern, that there was no evidence that Payton was in a psychotic state, and that his complaints of sleepwalking don't make sense. Merwin then retained Dr. E.W. Klatte, who interviewed Payton October 17, 1981 and reviewed several hundred pages of documentary material. Dr. Klatte discovered that Payton had consumed alcohol and drugs prior to the attack and had been looking for a woman to have "sexual relations" with. Payton admitted that some of the information he had given out to others was a lie, that he had problems dealing with women and sex, and sometimes worried that he was violent. He mentioned an incident with a former girlfriend he had stabbed while she was sleeping. Payton also told Dr. Klatte that his parents were kind to him, spoiled him, spent considerable time with him, and did not mistreat him. Dr. Klatte's opinion was that Payton was intelligent, well-oriented, and without evidence of organic brain pathology; that he was not unconscious at the time of the incidents; and that his use of cocaine six weeks before would not have precipitated the violence. In sum, he did not lack substantial capacity to appreciate the criminality of his conduct. After receiving Dr. Klatte's report, Merwin sought the views of one other mental health expert, Dr. Edward Kaufman. He gave Dr. Kaufman the same documentary material and Dr. Klatte's evaluation. Dr. Kaufman did not interview Payton, but rendered an opinion that was consistent with Dr. Klatte's.

Meanwhile, in October or November of 1980, Payton told a fellow inmate, Alejandro Garcia, that he had raped and stabbed Montgomery because he had "this urge to kill." In the same time frame he also began talking about the attacks with Daniel

Escalera, another inmate. Escalera was soon released but in late March, 1981 was re-incarcerated for violating probation. On April 3, Payton admitted to Escalera that he had a "severe problem" with women, that he wanted to "stab them and rape them," and that "all women on the street he seen was a potential victim, regardless of age or looks." Both Garcia and Escalera related what they had learned to the police. The prosecution disclosed their records (incomplete, as it turns out), and produced copies of their interviews. Merwin requested and obtained an evidentiary hearing pursuant to California Evidence Code § 402 to determine whether they were police agents, after which the trial judge found that neither was. Garcia testified in the guilt phase, and Escalera testified at the penalty phase.

The prosecution's case consisted of the law enforcement officers who observed the crime scene; forensics experts who testified that saliva and semen samples taken from Montgomery's body were consistent with Payton's; Patricia and Blaine Pensinger, who offered first-hand accounts; Payton's wife, who testified that she saw blood on Payton's penis as well as fingernail scratches and digs on his legs and back; and Garcia, who testified that Payton had admitted to the crime.[2] The defense called no witnesses.

Payton was convicted by the jury in the Superior Court for Orange County on all counts. The jury found true the special circumstance that the murder occurred while Payton was engaged in the commission or attempted commission of rape. Cal. Penal Code § 190.2(a)(17)(iii). The jury also found true that Payton used a deadly weapon (a butcher knife). Cal. Penal Code § 12022(b).

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[2]A friend of Montgomery also testified for the prosecution.

At the penalty phase, Escalera testified regarding his jailhouse conversations with Payton. In addition, Patricia Stone, Payton's former girlfriend, testified that she had once been awakened with Payton holding a kitchen knife to her neck. He began stabbing her chest and arms. The defense presented eight witnesses, including Payton's pastor, a deputy sheriff, four inmates, his mother, and the director of a religious organization that ministered to prisoners. They testified that Payton had made a sincere commitment to God, had a calming effect on other prisoners, and could help others while in prison through Bible study classes and a prison ministry.

During closing argument, both the prosecutor and Merwin discussed factor (k), one of the eleven mitigation factors jurors are to consider. Factor (k) permits consideration of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The trial court had rejected Merwin's request to modify the standard Califoria jury instruction that described factor (k) in the language of the statute,[3] so that it would instead refer specifically to "evidence

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[3]California Jury Instructions, Criminal 8.84.1 (4th ed. 1979) (CALJIC). The instruction provides:

> In determining which penalty is to be imposed on[each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case,[except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
> (c) The presence or absence of any prior felony conviction.
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another.
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.
> (i) The age of the defendant at the time of the crime.
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
> (k) Any other circumstance which extenuates the gravity of the time even though it is not a legal excuse for the crime.

of the defendant's character, background, history, mental condition and physical condition." Nevertheless, the judge

indicated that counsel could argue the point. The prosecutor stated that "this doesn't refer to anything after the fact or later" and that he did not think that evidence of religion put on by Payton was "really applicable" or "comes in under any of the eleven factors." Merwin moved for a mistrial, which was denied. The judge admonished the jury that arguments of counsel are not evidence, and instructed the jury to consider all of the evidence. Merwin's closing argued that factor (k) was a catch-all that was designed to include the kind of evidence that Payton presented. Payton was sentenced to death.

Payton appealed, and filed a petition for habeas corpus in the California Supreme Court.[4] After neither succeeded, he sought a writ of certiorari in the United States Supreme Court, which was denied. Payton v. California, 510 U.S. 1040 (1994). On May 4, 1996, Payton filed a petition for writ of habeas corpus in the district court. The court granted Payton's request for investigative funds, but on August 2, 1996 ruled that certain issues had not been exhausted. It stayed further federal proceedings to allow Payton to exhaust. After exhausting these claims, Payton filed an Amended Petition (at issue here) on January 30, 1998. The court rejected Payton's request for additional funds on July 7, 1998, and again on January 14, 1999.

The state moved for summary judgment, which the court granted as to all claims but claim IV(B)(3), the factor (k) error, on which it granted the petition on June 1, 1999. Both parties filed motions to alter or amend the findings, which the court denied. The court issued a final order December 17, 1999

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[4]The California Supreme Court appointed a referee to hold an evidentiary hearing to consider Payton's habeas claim that a psychological defense based upon his combat experiences in Vietnam should have been presented at trial. The referee found that Payton's claims of combat experience were false.

resolving all remaining issues. The state appeals and Payton cross-appeals.

The State's Appeal

II

California asks us to reinstate Payton's death sentence for two reasons: first, the district court applied AEDPA incorrectly by refusing to give deference to the California Supreme Court ruling that the factor (k) error was harmless; and second, the record supports the California Supreme Court's ruling that the erroneous factor (k) argument was harmless. As for the first point, the state recognizes that our decision in Calderon v. United States Dist. Ct. ("Kelly"), 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (holding that a petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, initiates the case), controls because Payton initiated his case before (although he filed his petition after) AEDPA's effective date. The state would like to see Kelly revisited, but this, of course, this panel cannot do. Accordingly, our review of Payton's petition is governed by pre-AEDPA standards.

Pre-AEDPA, Congress directed us that state court determinations of historical fact "shall be presumed to be correct." 28 U.S.C. § 2254(d) (West 1994). However, "[t]he application of a legal standard to historical facts does not constitute a factual finding entitled to a presumption of correctness under section 2254(d)." Thompson v. Borg, 74 F.3d 1571, 1573 (9th Cir. 1996) (quoting Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987)).

To establish prosecutorial misconduct, a petitioner must demonstrate that the prosecutor's closing "so infected the trial with unfairness as to make the resulting conviction a denial of

due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). "Improper argument does not, per se, violate a defendant's constitutional rights." Thompson, 74 F.3d at 1576 (quoting Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993)). If prosecutorial misconduct is established, and it was constitutional error, we then apply the Brecht[5] harmless error test. See Thompson, 74 F.3d at 1577 ("Only if the argument were constitutional error would we have to decide whether the constitutional error was harmless.").

The state contends that the California Supreme Court got it right and the district court got it wrong because proper application of Boyde v. California, 494 U.S. 370 (1990), in which the United States Supreme Court upheld the same CALJIC instruction on factor (k) that was used in this case, demonstrates that Payton was not deprived of his right to due process. In any event, the state submits, the prosecutor's erroneous statements were harmless.

Payton distinguishes Boyde by noting that unlike Boyde, no evidence was presented by the defense at the guilt phase in Payton's case; each of Payton's witnesses in the penalty phase testified only with respect to his post-arrest conduct whereas in Boyde, they testified to pre-arrest conduct; and the only indication in Boyde that the jury may have been precluded from considering relevant mitigating evidence was the ambiguous factor (k) instruction, while in Payton's case the prosecutor asserted that factor (k) was intended to refer only to events which extenuated the crime itself, not to events that occurred after its commission. Payton argues that this damage to his case was exacerbated by other instructions of the trial court that the jury could consider "all of the evidence which has been received during any part of this case, except as you may be hereafter

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[5]Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

instructed"; and that the jury"shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" after "having heard and considered the argument of counsel." In Payton's view, this gives rise to a "reasonable likelihood" that the jury was misled into believing that it could not consider his evidence in mitigation, Boyde, 494 U.S. at 380, as well as extreme prejudice, because this was his only evidence in mitigation of the death penalty.

Boyde upheld the factor (k) instruction given in that case, and this one, against a challenge that it violated the Eighth Amendment by effectively precluding consideration of non-crime-related factors.[6] The Court concluded that there was

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[6]The instruction (CALJIC 8.84.1) states:

> In determining which penalty is to be imposed on[each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

CALJIC 8.84.1 has since been amended. 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988). See People v. Easley, 34 Cal.3d 858, 878, n.10, 196 Cal. Rptr. 309, 322 n.10 (1983) (indicating change should be made to avoid potential misunderstanding over meaning of factor (k)).

no reasonable likelihood that jurors interpreted the instruction to prevent consideration of background and character mitigating evidence. As it explained:

> Petitioner had an opportunity through factor (k) to argue that his background and character "extenuated" or "excused" the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, "long held by society," that in an appropriate case such evidence would counsel imposition of a sentence less than death. The instruction did not, as petitioner seems to suggest, limit the jury's consideration to "any other circumstance of the crime which extenuates the gravity of the crime." The jury was directed to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character.

Id. at 382 (emphasis in original). Of course, the problem in Payton's case is somewhat different because Payton's prosecutor argued to the jury that the religion evidence did not reduce the gravity of the crime as it happened later. The Court noted that the prosecutor in Boyde had not argued that Boyde's background and character evidence was irrelevant or should not be considered. Id. at 385. However, Boyde also asserted that the prosecutor's arguments there -- that Boyde's mitigating evidence did not suggest that his crime was less serious, and nothing the prosecutor had heard lessens the seriousness of the crime -- reinforced an impermissible interpretation of factor (k), and what the Court said in addressing this contention is also instructive here:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as

> matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Id. at 384-85 (internal citations omitted).

In this case, there is no question that the prosecutor misstated what factor (k) refers to. He argued that"any other circumstance which extenuates or lessens the gravity of the crime . . . doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity." This was incorrect, as the California Supreme Court held.[7]

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[7]The dissent relies on what it states that the California Attorney General's office "conceded" in argument to the United States Supreme Court in Boyde -- that "the prosecutor in Payton had `misled the jurors.' " Dis. op. at 9747. Whether or not this would matter if it happened (the question here is prejudicial error, not error), the state in fact made no such concession. What happened was that during a discussion about whether reasonable people could misinterpret the language of the factor (k) instruction that the Court ultimately approved, a justice remarked that "[a]t least one prosecutor, you would agree, has read it the way your opponent says the jury might read it." The following colloquy then occurred:

The question is whether this incorrect argument so infected the penalty phase with unfairness that the resulting sentence denied Payton due process. We do not think so. We examine Payton's claim mindful of the presumption that jurors follow a court's instruction. See Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). As Boyde counsels, prosecutors' comments lack the force of jury instructions, and we cannot say that reasonable jurors in Payton's case were likely to conclude from the prosecutor's statements, in context of the arguments as a whole together with the court's instructions, that they could not consider Payton's mitigating evidence at all.

The prosecutor began his closing argument by reading the entire instruction on the eleven mitigating factors that the jury was to be given, then stating: "I'm going to go over them, some of these are applicable and some of them are not, depending on

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> MR. MILLAR: I would say that he misled the jurors in those case [sic], as far as what the face of that –
>
> QUESTION: But don't you suppose he did so because that is the way he read the instruction?
>
> MR. MILLAR: Well, I think we are speculating as far as what particular prosecutors did in particular –

Trans. Oral Argument, Nov. 28, 1989, Boyde, 1989 U.S. TRANS LEXIS 124, *26, *28-*29. It is impossible to tell from the transcript whether the exchange even referred to Payton. In sum, as the California Supreme Court said, "[w]e have examined the transcript of the oral argument in Boyde, and find nothing in it relevant to the proper resolution of this case." Payton, 3 Cal.4th at 1073, 13 Cal. Rptr. 2d at 541.

your findings." R.T. 2117. When he got to factor (k) and incorrectly stated that "[i]t doesn't refer to anything after the fact or later," Merwin moved for a mistrial. The court admonished the jury that comments of counsel are not evidence and that "this is argument. And it's to be placed in its proper perspective." The prosecutor went back to factor (k), arguing that the problem with Payton's new Christianity is that "that evidence is well after the act of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed. . . . What I am getting at, you have not heard during the past few days any legal evidence mitigation [sic]. What you've heard is just some jailhouse evidence to win your sympathy, and that's all." Then he reviewed the aggravating evidence, and concluded by turning to religion. He prefaced this discussion with the remark that he did not "really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors." He argued that religion can't whitewash the past, that the jury should not be impressed with Payton's writings about what he felt while he was a fugitive in Florida, that Payton got religion after he was in custody, and that he did not give mercy to Montgomery. Summing up how the factors should line up, the prosecutor said: "You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery, and I really doubt if Mr. Merwin would dispute that breakdown of the facts."

Merwin's argument noted that he disagreed with the prosecutor about the applicability of factor (k). He told the jury that "you first have to look at the factor that's being discussed and decide in your own mind whether that factor is applicable to the facts of our case." Like the prosecutor, he argued whether the various factors were applicable or not. When he got to factor (k), Merwin indicated that this was one where"we disagree rather strenuously." He stated: "Mr. Jacobs tells you that's not

applicable. If that's not applicable and that therefore all the evidence we presented is not applicable, why didn't we hear any objections to its relevance?" The prosecutor objected and the court said it was not going to repeat the admonition. Merwin continued:

> The whole purpose for the second phase of trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to that.
>
> This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence.
>
> Any jury that wanted -- that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.
>
> I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of all the factors and I want to go through some of the reasons for that with you now.

R.T. at 2150-51.

The court's final instructions directed the jury:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence

> which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k), Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

In context, the prosecutor's incorrect statement was ameliorated by the court's admonishment, his discussion of Payton's mitigating evidence, his concession that at least some points would go to it, defense counsel's broad reading of factor (k), and the court's instructions that the jury "shall" consider "all" the evidence -- which necessarily included Payton's evidence of religious conversion.

Set against this, we are not persuaded that the court left it to the prosecutor to instruct on the law, or that the court and the prosecutor between them left it to the jury to determine the law. The entire mitigating evidence instruction is the same as the entire mitigating evidence instruction that the Supreme Court considered in Boyde. See 494 U.S. at 373, n.1 (quoting instruction in full). We cannot believe that when the trial court instructed the jury to consider all the evidence "except as you may be hereafter instructed," the phrase "except as you may be hereafter instructed" matters, constitutionally or otherwise, because nothing that was thereafter instructed told the jury that any evidence received during the trial, guilt phase or penalty phase, was excluded from their consideration. All of it was on the table. The defense evidence at the penalty phase focused entirely on evidence of Payton's religious conversion.

Both the prosecutor and defense counsel argued its value. Both treated the applicability of the mitigating factors, including factor (k), as depending upon what the jury found convincing in the evidence. Each expressed a different view. Further, the court's initial instructions, which were again given to the jury at the penalty phase, made clear that it is the court that instructs on the law.[8] The prosecutor never suggested otherwise.

In these circumstances, we think it unlikely that reasonable jurors would believe the prosecutor's incorrect statement "transformed all of this `favorable testimony into a virtual charade.' " Boyde, 494 U.S. at 383 (quoting California v. Brown, 479 U.S. 538, 542 (1987)). To do so they would have had to ignore the whole of the penalty phase, the court's instruction to put the prosecutor's argument in perspective and to consider all the evidence, and the attention given by both parties in argument to Payton's religious conversion. We presume that jurors follow the court's instructions,[9] and we cannot believe that they would have refused to consider Payton's penalty phase evidence simply because the prosecutor stated that, to him, factor (k) didn't mean something that happened after the fact.

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[8]The trial court instructed:

> Your . . . duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict.
>
> It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

[9]See Weeks, 528 U.S. at 234.

This being so, we cannot conclude that the penalty phase of Payton's trial was infected with such unfairness as to render his sentence a denial of due process. See Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000); Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995). We therefore vacate the writ.

Payton's Cross-appeal

Payton's cross-appeal raises three overarching issues: whether his counsel rendered ineffective representation, whether the prosecutor's conduct denied Payton due process, and whether the district court erred in refusing to grant him additional funds to develop his mental defense, to investigate the background of both informants, and to pursue the prosecutor's failure to disclose their background to the defense. None requires the petition to be granted.

III

Payton argues that Merwin conducted an incompetent investigation into Payton's mental state in the guilt phase by failing to investigate his conduct on the night of the murder; failing to investigate his personal and family background sufficient to develop information for a competent evaluation; and failing to obtain a forensic evaluation. He also claims that Merwin was ineffective in failing to seek appropriate discovery from the prosecution; failing to investigate the background of the informants; focusing the jury panel on a psychiatric defense that was never presented; and failing adequately to consult with Payton. Individually and cumulatively, he submits, these errors invalidate his conviction.

The standards are well established. To prevail under Strickland v. Washington, 466 U.S. 668 (1984), Payton must show that his "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. Counsel's

performance is measured "as of the time of counsel's conduct," id. at 690, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.' "[10] Id. at 689 (quoting Michel v. Louisiana , 350 U.S. 91, 101 (1955)). Because Payton must prove both deficient performance and prejudice, we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id. at 697.

Payton must "affirmatively prove prejudice." Id. at 693. This requires showing more than the possibility that he was prejudiced by counsel's errors; rather, he must demonstrate that the errors actually prejudiced him. See id. Under Strickland, actual prejudice occurs where "there is a reasonable probability

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[10]As the Supreme Court emphasized in Strickland:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 690-91.

that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Whether an error actually prejudiced a defendant is weighed against the "totality of evidence before the judge or jury." Id. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at 696.

Finally, Payton's "ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." Bragg v. Galaza , 242 F.3d 1082, 1088 (9th Cir. 2001) (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)). Here, the government's case was overwhelming. Payton was linked to the crimes by physical evidence and eye-witness testimony, and confessed to an urge to kill. We consider each of his claims in that light.

A

The record demonstrates that Merwin conducted a reasonable investigation of Payton's behavior on the night of the attack. A defense investigator interviewed two potential witnesses, both of whom described Payton's drinking and two incidents of attempted sexual assault. Given these reports, reasonable counsel could presume that exculpatory evidence would not develop from further investigation. A defense counsel is not ineffective where he to fails to interview a witness when the witness's "account is otherwise fairly known . . . ." Bragg, 242 F.3d at 1088 (quoting Eggleston, 798 F.2d at 376); see also Strickland, 466 U.S. at 691 ("[W]hen the facts that support a certain potential line of defense are generally known to counsel . . . the need for further investigation may be considerably diminished or eliminated altogether."). More to the point, Payton cannot identify any exculpatory evidence that was never

discovered. In the absence of such evidence, there can be no prejudice. See Bragg, 242 F.3d at 1088-89 (petitioner failed to identify what information further investigation would have revealed and how it would have been relevant given the strength of the government's case).

Payton did submit new evidence indicating that his biological father was abusive during the first five years of his life, that he was ignored by his mother and step-father, that he may have had a learning disability as a child, that he suffered negative psychological consequences as a result of his service in Vietnam, and that he has a history of substance abuse. However, Merwin, the experts, and the investigator interviewed Payton and his family and nothing they were told at the time would have tipped them to pursue any of these matters further. Their investigation revealed that Payton was raised in a happy home, that he was intelligent (possibly even in the superior range), and that he had used or abused drugs but was not on or affected by drugs at the time of the attacks. They also reviewed Payton's service records, which showed that he served in a non-combat capacity in Vietnam for twenty-two days before being discharged on account of heroin use. As found at the state evidentiary hearing, Payton admitted that he had not in fact had any combat experiences and any evidence of post traumatic stress disorder would have been almost totally unbelievable. See People v. Payton, 3 Cal.4th at 1074-79, 13 Cal. Rptr. 2d at 542-45. Thus, although it is difficult to fault counsel's investigation,[11] we need not resolve the issue because it is clear

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[11]Cf. Seidel v. Merkle, 146 F.3d 750, 755-56 (9th Cir. 1998) (as amended) (despite signs of mental illness trial counsel failed to conduct any investigation at all into defendant's psychiatric history); see Hendricks v. Calderon, 70 F.3d 1032, 1037-39 (9th Cir. 1995) (counsel not ineffective for relying on psychiatric evaluations rather than independently investigating defendant's personal and family history).

that Payton has not shown that the negative evaluations of any of his mental health experts would be different because of the family history that he now proffers. He has not, therefore, proved prejudice.

Payton's claim with respect to forensic evaluation centers on Merwin's delay in obtaining psychiatric evaluations and how he handled the reports, particularly his delivery of Dr. Klatte's evaluation to Dr. Kaufman. So far as delay is concerned, nothing suggests that Dr. Klatte's opinion would have been different had it been rendered earlier. Dr. Klatte specifically stated at the state habeas evidentiary hearing that he had enough information to form his opinion. Further, by then, Payton had already been evaluated by Dr. Sheffner with similar negative results. Likewise, there is no evidence that Dr. Kaufman's evaluation would have been different had it been handled differently. Payton claims that counsel should have had Dr. Kaufman interview Payton, although Dr. Kaufman himself did not say that an interview was necessary, and that counsel erred under California law by giving him Dr. Klatte's report.[12] But even putting Dr. Kaufman's opinion aside, two mental health experts came to nearly identical conclusions. There is no showing of any different opinion. For this reason it is unnecessary to decide whether counsel erred under California law in giving Dr. Kaufman Dr. Klatte's report, as Payton contends. Payton was not prejudiced regardless.

B

Payton asserts that he was prejudiced because Merwin failed to request or obtain a court order for discovery compliance. Had

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[12]See People v. Coddington, 23 Cal.4th 529, 603-06, 97 Cal. Rptr. 2d 528, 593-96 (2000) (disclosure of non-testifying experts who examined defendant protected by work product privilege).

he done so, Payton maintains that he would have obtained information critical to the defense for both guilt and penalty phases on Alejandra Garcia, one of the informants who testified against him. He claims that the additional information would have shown prior instances when Garcia provided information to the government in exchange for guilty pleas, and facts establishing that Garcia targeted Payton as a source of information to develop for the benefit of law enforcement. Assuming counsel should have followed-up on the prosecution's voluntary disclosures, we nevertheless see no reasonable probability that the results would have been different.

None of the evidence that Payton adduced suggests that Garcia was acting as a government agent or otherwise elicited the confession in violation of Massiah v. United States, 377 U.S. 201 (1964). Payton conceded as much at oral argument.

Nor would further impeachment have any reasonable probability of producing a different outcome. Garcia in fact had three more convictions than the seven Merwin knew about, but they would simply have been cumulative.[13] Garcia admitted at trial that he had been convicted of felony forgery in 1959, burglary in 1971, grand theft in 1975, and a burglary the previous September. He also testified that he had recently "cleared paper" on over 300 burglaries in exchange for probation on his most recent burglary charge. Garcia stated that he had no charges pending against him, and that he was not offered, and was not receiving, anything for his testimony. Nothing suggests otherwise.

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[13]See United States v. Marashi, 913 F.2d 724, 732 (9th Cir. 1990) (holding no Brady error occurs "when the evidence would not have affected the jury's assessment of the witness' credibility and when the witness was subjected to vigorous cross-examination.") (quoting United States v. Endicott, 869 F.2d 452, 456 (9th Cir. 1989)).

Payton's discovery that Garcia had testified as an informant in 1976 does not undermine our confidence in the result, because there is no evidence that he sought or received any consideration for his testimony in that case except for an undertaking to try to arrange out-of-state incarceration for his safety. Similarly, the fact that Garcia was permitted to serve time for his latest burglary conviction at the Anaheim City Jail instead of state prison after he "cleared paper" does not show that he had charges pending for which he expected any consideration. Payton's claim that Garcia committed perjury when he testified that his probation was revoked for failing to report, whereas it was actually revoked for a positive drug test, lacks merit; it is unclear whether his probation was revoked for one, the other, or both. Consequently, we see no prejudice.

C

Payton argues that Merwin's voir dire inquiries about prospective jurors' attitude toward presentation of psychiatric evidence, and disclosure of the identity of potential experts who might be called as witnesses, was prejudicial as it led the jury to expect that defense psychiatric evidence would be forthcoming. Merwin explained at his deposition that he believed a juror's views on psychiatric evidence gave insight into their beliefs on life and reasonable doubt, as well as their ability to weigh aggravating and mitigating factors. This was a tactical decision that we decline to second guess. In any event, Payton has shown no actual prejudice because he only speculates as to the effect this line of questioning had on the jury.[14]

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[14]See Wade v. Calderon, 29 F.3d 1312, 1318 (9th Cir. 1994) (petitioner suffered no prejudice on account of counsel's failure to examine jurors during voir dire concerning diminished capacity and insanity defenses where defense later relied upon those theories).

D

Payton claims that during the year between his appointment and commencement of trial, Merwin only conferred with him for 8.1 hours, but he points to nothing that would have happened differently had Merwin and he spent more time together. Absent this, there is no reasonable probability that the results of the proceeding would have been different.

E

Payton contends that the prosecutor committed misconduct during the guilt phase by failing to disclose Brady[15] material which could have further impeached Garcia and made it likely that the superior court would have rendered a more favorable ruling on the admissibility of Garcia's testimony. To prove a Brady violation, Payton must show that: "(1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment." Paradis v. Arave, 130 F.3d 385, 392 (9th Cir. 1997). Impeachment evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley , 514 U.S. 419, 433 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). For reasons we have already explained, we do not believe that the additional, undisclosed information was material, as it would not have undermined Garcia's credibility any more than his credibility was already undermined by testimony about his prior convictions and "clearing paper" on approximately 300 burglaries in exchange for probation on his most recent charge. Neither can we say that it would have changed the result of the state court hearing; there is no suggestion that Garcia had any

[15]Brady v. Maryland, 373 U.S. 83 (1963).

promise of leniency or other consideration for testifying in Payton's case.

F

Payton's claim of prejudicial, cumulative error turns on the absence of adequate preparation of a mental defense. However, Merwin investigated Payton's conduct during the night of the crime, family background, and mental health, and Payton has not demonstrated that any mental health expert would diagnosis him differently from Dr. Sheffner, Dr. Klatte, and Dr. Kaufman. Consequently, no error occurred on these claims. Nor do we see any error during voir dire. Payton's claim of ineffective assistance of counsel for Merwin's failure to investigate Garcia and his claim of prosecutorial misconduct for the prosecutor's failure to disclose evidence about Garcia are opposite sides of the same coin. Thus, cumulatively, these claims cause no more prejudice than they do independently.

IV

Payton's penalty phase arguments all focus on claims of ineffective assistance of counsel. The Strickland analysis is the same with respect to the penalty phase as it is with the guilt phase. "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695.

A

Payton contends that Merwin failed to examine prospective jurors properly about their attitudes toward the death penalty,

reflecting his (improper) belief that a juror was to engage in a mechanical tallying of aggravating and mitigating factors; failed to object to the prosecutor's advice that if the aggravating factors outweigh the mitigation, the jury should vote for the death penalty; and improperly failed to articulate that the determination must be resolved by each individual juror. Regardless, the trial court correctly instructed the jury at the penalty phase on its duties in arriving at an appropriate punishment, see Boyde, 494 U.S. at 377, and we presume that the jury followed the instructions. See Weeks, 528 U.S. at 234.

B

Payton argues that his counsel was ineffective for failing to investigate the background of jailhouse informant, Daniel Escalera, who testified during the penalty phase, to determine his credibility or history as a government agent. Payton first contends that had Merwin read the transcript of Escalera's statements to investigators, he would have known that he was a government agent. The tape does not show this, although arguably it should have spurred further inquiry. Postconviction, Payton uncovered evidence of Escalera's numerous arrests, work for the Drug Enforcement Agency, and testimony as an informant. Still, nothing shows that Escalera was planted as a government agent to elicit incriminating information from Payton, thereby violating his Massiah rights. As with Garcia, Payton acknowledged at argument that there was no reasonable likelihood that Escalera would not have been allowed to testify even if his post-conviction discoveries had been known at the time.[16]

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[16]See People v. Pensinger, 52 Cal.3d 1210, 1249-50, 278 Cal. Rptr. 640, 658-59 (1991) (holding that an informant, who had a prior history of being an informant, was not a government agent where the informant initiated discussions with the police; the police did not ask for the informant to take any action or to

Second, he asserts that a reasonable investigation would have discovered substantial evidence that could have further impeached Escalera at trial. However, Escalera's prior convictions came out on both direct-examination and cross-examination, as did his recent guilty plea to a felony robbery charge in exchange for a potential prison sentence of one to seven years; Escalera also admitted that he hoped for leniency for testifying against Payton. Thus, the jury was aware that Escalera had a motive for giving testimony. In that context, further information about his background as a confidential informant in unrelated drug cases, and leniency received in return for testimony in those cases, would unlikely have swayed the jury.

C

Payton contends that Merwin rendered constitutionally ineffective assistance in failing to investigate timely and adequately, and to present evidence about, his personal, family, and mental background during the penalty phase of the trial. "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." Smith v. Stewart, 241 F.3d 1191, 1198 (9th Cir. 2001) (quoting Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir.), cert. denied, 527 U.S. 1049 (1999)). "Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel." Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998). Here, of course, mitigating evidence was presented and, as we have discussed, Merwin did investigate Payton's personal and family background. Payton points to

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"keep his ears open"; the police did not offer leniency; the police did not know that the witness had previously been an informant; the police told the informant he was not their agent; and the prosecutor testified on the informant's behalf at his trial).

post-conviction declarations by siblings which show that he may have suffered abuse from his biological father during his first five years, but the evidence is inconclusive at best. Two of the three are unsure whether Payton was abused, and the other provides no details. Even so, the record shows the first five years were followed by a normal and supportive environment.

Nor was counsel deficient for failing to present evidence of mental defect. Such evidence did not exist then, and does not exist now. Merwin consulted with mental health experts, but their opinions were aggravating rather than mitigating. Although Payton contends that the experts lacked the information or time to diagnose him properly, he has proffered no medical opinion to undermine our confidence in those evaluations. In short, there is no basis for finding prejudicial error.

Finally, the state's case of aggravation was overwhelming. The crimes were vicious and Payton had committed a similar attack in the past. Thus, even if Payton's speculative mitigation evidence were thrown into the balance, there is no reasonable probability that the outcome would have been different. See Bonin v. Calderon, 59 F.3d 815, 836 (9th Cir. 1995) ("[I]n cases . . . where the aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigation evidence.").

D

Payton maintains that Merwin failed to develop and present evidence of post-traumatic stress disorder (PTSD) resulting from his service in the Vietnam War, but offers nothing substantial in support. In any event, Payton cannot demonstrate that Merwin was deficient for failing to investigate a defense that did not exist until after Payton lied about his combat experience. Further, the record indicates that Merwin did

investigate Payton's service in Vietnam (and found no "red flags" which warranted further investigation), and that he disclosed Payton's service record to the psychiatrists who examined him, none of whom diagnosed him with PTSD. See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (holding that counsel cannot be faulted for failing to pursue a mental state defense when such a defense seems unlikely); Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (as amended) (holding that counsel had no obligation to seek out specific PTSD experts rather than the experts counsel actually retained).

E

Payton contends that Merwin should have objected when the prosecutor argued to the jury about his mitigation evidence, "What you've heard is just some jailhouse evidence to win your sympathy, and that's all." He relies on California v. Brown, 479 U.S. 538, 542-43 (1987), and Lockett v. Ohio, 438 U.S. 586, 604 (1978), but neither is apposite because Merwin's failure to object did not tacitly concede that the jury could not consider sympathy.

F

Finally, Payton argues that his sentence must be overturned because of cumulative error. Even when we consider all of Payton's claims cumulatively, we do not see errors that "had substantial and injurious effect or influence in determining the jury's verdict" because the jury would have reached the same conclusion anyway. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

V

Payton asks us to reverse the district court's determination that he was not entitled to additional funds to complete his

psychiatric evaluations in order to demonstrate prejudice resulting from trial counsel's failure adequately to pursue a mental defense. We review the denial of investigative funds for an abuse of discretion. See Bonin, 59 F.3d at 837. We have thoroughly examined the record and documents that Payton has filed under seal, and conclude that the district court did not err. Payton was entitled to "reasonably necessary," not unlimited, funds. See id. The record and sealed documents indicate that Payton has had ample opportunity and funding to complete necessary mental health evaluations. He received three mental health examinations in preparation for trial, and substantial investigation into his claimed PTSD which only arose after he lied about his Vietnam War service record. Payton's inability to produce evidence supporting his petition is not indicative of his lack of funding; rather, it demonstrates the lack of merit to his claims.

Conclusion

We disagree with the district court's conclusion that the prosecutor's closing argument rendered Payton's penalty trial fundamentally unfair. We agree that Payton has failed to demonstrate any basis for habeas relief on his guilt phase claims or remaining penalty phase claims. Accordingly, we reverse the judgment entered on Claim IVB, item 3 of the Petition for Writ of Habeas Corpus and order the writ vacated. Otherwise, we affirm.

AFFIRMED IN PART; REVERSED, VACATED AND REMANDED IN PART.

HAWKINS, Circuit Judge, concurring in part and dissenting in part:

Because I agree with the district court that Payton was deprived of his due process rights in the penalty phase of his trial, I respectfully dissent from Section II of the opinion.[1]

This is a case of compound error involving a serious and repeated misrepresentation of law by the prosecutor. The initial error occurred when the prosecutor was permitted, in effect, to instruct the jury that it could not legally consider Payton's mitigating evidence -- evidence that the California appellate courts acknowledge was completely admissible. Bad enough that this should happen, but in a nearly complete abdication of its responsibility to properly explain the law to the jury, the state trial court not only failed to correct the misinformation, it permitted the prosecutor to argue his own interpretation of a sentencing factor as if it were the law. Because the prosecutor's "instructions" told the jury it must ignore the only mitigation evidence that Payton offered, the decision whether to consider it made the difference, quite literally, between life and death. All this was done without ever correctly instructing the jurors that the evidence was fully admissible and that they were required to consider it. The result of this deadly combination of prosecutorial misleading and judicial abdication "fundamentally affected the fairness" of the penalty phase of Payton's murder trial and violated his due process rights. Darden v. Wainwright, 477 U.S. 168, 181 (1986). The district court was quite right to determine that the proper remedy was to order the state to conduct a new penalty phase hearing for Payton or commute his death sentence to life without possibility of parole.

In its so-called "unadorned version," factor (k) instructed the members of the jury that they could consider: "Any other circumstance which extenuates the gravity of the crime even

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[1] I concur in the result with respect to the guilt phase, the remaining penalty phase issues and the denial of additional investigative funds.

though it is not a legal excuse for the crime."[2] Although in a chambers conference the trial court agreed with Payton's counsel that factor (k) was a "wide open," "catch-all" provision, Payton's request for an instruction to make clear to the jury that his mitigating evidence should be considered was refused. Were this the end of the story, I might agree with the majority that Payton's case is quite similar to Boyde v. California, 494 U.S. 370 (1990), which addressed the constitutionality of former CALJIC 8.84.1.

Unlike the prosecutor in Boyde, however, who" `never suggested that the [defendant's] background and character evidence could not be considered,' " id. at 384 (quoting People v. Boyde, 758 P.2d 25, 47 (1988)), the prosecutor in Payton's case, armed with the authorization of the trial court, told the jury it could not legally consider Payton's only mitigation evidence, the evidence of his religious conversion. First, the prosecutor argued that factor (k) referred only to:

> some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only

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[2]In People v. Easley, 671 P.2d 813 (Cal. 1983), the California Supreme Court recognized the potential for confusion over the meaning of factor (k). Id. at 826 & n.10. The instruction was later changed to read "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." Boyde v. California, 494 U.S. 370, 375 n.2 (1990) (quoting 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988)). Payton's trial occurred prior to the decision in Easley.

> defense evidence you have heard has been about this new born Christianity. (Emphasis added).

Although Payton's counsel objected to this argument as inconsistent with the agreement reached in chambers regarding factor (k), the judge decided to let the attorneys "make that argument either way." The prosecutor then resumed his attack on the legality of Payton's mitigation evidence:

> The only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed. . . . What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial. (Emphasis added).

The prosecutor continued this theme throughout the closing, noting later on that "You've heard no evidence of any mitigating factors" and then, even later, addressing Payton's evidence but reiterating that "I don't think it's really applicable and I don't think it comes under any of the eleven factors."

The majority concedes that the prosecutor's argument was improper but argues that it did not so infect the penalty phase with unfairness as to deprive Payton of due process. First, the majority argues that the impact of the prosecutor's initial statement was diluted by a "curative" instruction from the judge. Once the prosecutor began suggesting that Payton's mitigation evidence was inapplicable, Payton's attorney immediately

objected. The judge overruled this objection, however, and indicated he was going to let each side"argue it." He then simply commented to the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument." With that, the judge permitted the prosecutor to continue to admonish the jurors that the California sentencing factors simply did not let them consider any mitigating evidence pertaining to events after the crime. It is difficult to determine how the court's limited intervention did anything to correct the error; if anything, it expressly permitted the error to be repeated.

Next, the majority argues that the prosecution discussed the defense's evidence in mitigation and "conceded" it had at least some merit. Again, I disagree. The prosecution put very little emphasis on the defendant's evidence and then did so without ever conceding it could or should be considered.[3] His limited discussion of Payton's evidence also pales in comparison to the prosecutor's repeated arguments to the jury that it could not consider the only evidence in mitigation offered by Payton.

The majority also contends the prosecutor implicitly conceded the validity of Payton's defense when he said: "If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery." The majority reads

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[3]Specifically, the few comments the prosecutor did make were prefaced as follows:

> I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors . . ..

this as conceding Payton's religious conversion evidence was worth at least 100 points. The more logical interpretation is that the prosecutor was telling the jury that 900 points would go to the rape/murder, with the other 100 points going to other aggravating factors, such as prior felonies. Whatever the interpretation, it is highly unlikely a jury would (1) view such an obtuse "concession" as undermining the prosecutor's explicit, repeated argument that the evidence could not be considered, or (2) disregard the prosecutor's caveat that even though he was discussing the religion evidence, he still did not believe it could be considered.

The majority also asserts the effect of the prosecutor's argument was blunted because the defense was permitted to argue for its own interpretation of factor (k). Although defense counsel told the jury it could consider Payton's evidence, he could point to no language in the statute or instruction that supported this claim. He instead was left with arguing that factor (k) was "awkwardly worded," but that it did not preclude consideration of the post-crime religious conversion. This is in stark contrast to the repeated argument of the prosecution, referring to the language in factor (k) -- "extenuates or lessens the gravity of the crime" -- to bolster the argument that the language of factor (k) refers only to some fact in operation at the time of the offense. Cf. Penry v. Johnson, 121 S. Ct. 1910, _____ (2001) (rejecting argument that defense counsel had sufficiently clarified application of jury instruction because prosecutor had "effectively neutralized defense counsel's argument" and "[a]t best, the jury received mixed signals").

The majority also relies on the "consider all the evidence" instruction given to the jury. More precisely, the jury was instructed to consider "all the evidence . . . except as you may be hereafter instructed." (emphasis added). The very next instruction the jurors heard was CALJIC 8.84.1 regarding aggravating and mitigating factors, including factor (k), which

the prosecution had told them precluded consideration of Payton's evidence. The generic "consider all the evidence" instruction did nothing to undo the damage.

The majority relies heavily on Boyde, in which the Supreme Court determined that the context of the proceedings in that case would have led reasonable jurors to the proper interpretation of factor (k). 494 U.S. at 383. However, Boyde is different in several significant respects. First, Boyde's mitigating evidence involved his background and character, pre-crime evidence which more readily fits within factor (k). Payton's only evidence was post-crime, a distinction the prosecutor brought home again and again. Second, Boyde presented "four days of testimony consuming over 400 pages of trial transcript," which led the Supreme Court to conclude a reasonable jury would not disregard such "volumes " of mitigating evidence without more specific direction. Id. at 384. The Supreme Court also noted, however, that "(p)resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." Id. In Payton's case, his mitigating evidence was much less voluminous -- it was presented in one day and took only seventy-three pages of transcript.

Finally, and most importantly, the prosecutor in Boyde never suggested that the defendant's mitigation evidence could not be considered. Id. at 385. The Supreme Court emphasized that the prosecutor's principal theme was not that Boyde's mitigation evidence could not be considered, but that it should be given minimal weight in light of the aggravating circumstances. Id. The exact opposite is the case here. In fact, in oral argument before the Supreme Court in Boyde, the California Attorney General discussed this very case and conceded that Payton's prosecutor had "misled the jurors." See Trans. Oral Argument, Nov. 28, 1989, Boyde, 1989 U.S. Trans. Lexis 124, *10-11,

*26-28;[4] see also Boyde, 494 U.S. at 386 n.6 (noting that "prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment" but that did not mean the jury in Boyde arrived at the same conclusion).

This is not a case where the prosecutor made an offhand remark during the course of trial. The prosecutor's erroneous argument was far from subtle. It was explicit, deliberate, consistent and repeated. Certainly, arguments of counsel generally carry less weight than instructions from the court. Boyde, 494 U.S. at 384. But when the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct. See Griffin v. United States, 502 U.S. 46, 59 (1991) (if "jurors have

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[4]Although the majority contends it is "impossible to tell from the transcript whether the exchange even referred to Payton," I believe it is quite clear that it did if one reads the entire transcript. Boyde's counsel referenced an amicus brief containing examples of prosecutors misreading section (k), and then asked the Court to consider, specifically, "the case of People versus Payton." 1989 U.S. Trans. Lexis 124, *10-11. During the State of California's argument, the Court asked counsel to address Boyde's argument concerning Payton. Id. at *26-27 ("Let me ask you about the prosecutor's argument in the other case that your opponent referred to . . . .") (emphasis added). It was in this context that the State said that the prosecutor in Payton had misled the jurors. Id. at *27-28. Moreover, in oral argument before this panel, the State admitted that the exchange occurred and involved Payton, but argued it was improper for the attorney to have made such a statement to the Court because the attorney was not sufficiently familiar with the record in Payton to have reached such a conclusion.

been left the option of relying upon a legally inadequate theory, there is no reason to think their own intelligence and expertise will save them from that error").

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered" by a defendant. Boyde, 494 U.S. at 377-78. The prosecutor's argument in this case flies directly in the face of this constitutional requirement. The context of Payton's penalty phase as a whole did little, if anything, to mitigate the prosecutor's error. The district court correctly and properly determined that the prosecutor's argument so infected the penalty phase with unfairness that Payton was denied due process. Darden, 477 U.S. at 181.

Was the error harmless under Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)? Under Brecht, an error is not harmless if it "had a substantial or injurious effect in determining the jury's verdict." Id. Quite frankly, if this error was harmless, it is difficult to imagine a sentencing phase error that would not be. The prosecutor told the jury it could not consider the only evidence of mitigation that Payton put forward. Without this evidence, the jury had no alternative but to reach a death verdict.[5]

Like many of the capital cases we review, Payton's crimes were certainly heinous. But that does not relieve us of the responsibility to ensure that the jury was properly advised and able to consider all properly admissible evidence. As we have previously explained:

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[5]The jury was instructed "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." (emphasis added).

> The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision . . . .

Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995).

This is not a case where effective but fair argument convinced a jury that the evidence of aggravation outweighed the evidence in mitigation. The prosecutor here was permitted to erroneously tell the jury what it could and could not consider. The trial court's flippant comment to allow the parties to "argue it" abdicated its responsibility to tell the jurors that Payton's evidence in mitigation was fully admissible and that they were required to consider it. Under these circumstances, it is difficult to imagine how the prosecutor's arguments could not have had a substantial and injurious effect on the jury's verdict.

It is very difficult to have confidence in the outcome of a life and death decision made in these circumstances. The verdict might have been reached through an appropriate weighing of aggravating versus mitigating factors, but it seems much more likely to have been reached because the jury erroneously believed there were no mitigating factors it could legally consider. For the reasons stated, I would affirm the district court's decision to grant the writ as to the penalty phase of Payton's trial.

APPENDIX E

APPENDIX E

[Filed December 17, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM CHARLES PAYTON, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 94-4779-R FINAL ORDER **DEATH PENALTY**

I. Introduction

Petitioner William Charles Payton is a prisoner on California's death row. He invoked the jurisdiction of the Court by requesting, pursuant to 21 U.S.C. § 848(q), the appointment of counsel to assist him in preparing and litigating a petition for writ of habeas corpus. Currently before the Court is the Amended Petition for Writ of Habeas Corpus filed on January 30, 1998.

On February 10, 1999, respondent filed a motion for summary judgment on the majority of the claims in the petition. On June 1, 1999, the Court granted the motion for summary judgment as to Claims 3 (A) (1) - (7), (9) - (21); 4 (A) (1) - (4),

(6) - (12); 3 (B) (1) - (3); and 4 (B) (1) and (2). The Court denied the motion as to Claim 4 (B) (3) and granted the petition as to the death sentence on that claim. The Court held that the prosecutor committed misconduct in urging the jury to disregard the mitigating evidence presented by Payton at the penalty phase.

The Court ordered the parties to file briefing on the remaining claims in the petition. Payton filed a brief on July 27, 1999. Respondent filed an opposition on August 24, 1999, and Payton filed a reply on September 8, 1999.

The Court has considered the state court record, the arguments of counsel, and all of the papers, pleadings, and records on file herein. The Court has thoroughly examined each issue raised by Payton and finds that none of the remaining claims warrant relief. Accordingly, the Court **DENIES IN PART AND GRANTS IN PART** the amended petition for writ of habeas corpus.

II. Background

A jury in California convicted Payton of murder while in the commission of a rape and two counts of attempted murder. After a penalty trial, the jury returned a verdict of death.

Payton filed a state habeas petition in conjunction with his automatic appeal. The California Supreme Court held an evidentiary hearing on the claim that Payton's trial counsel was ineffective for failing to present evidence that he suffered from Post-Traumatic Stress Disorder ["PTSD"]. On November 23, 1992, the California Supreme Court affirmed the conviction and sentence on direct appeal and denied the habeas petition. People v. Payton, 3 Cal.4th 1050, 13 Cal.Rptr. 2d 526 (1992) cert. denied, 114 S.Ct. 682 (1994).

Payton filed a federal habeas petition on May 6, 1996. Respondent filed a motion to dismiss for exhaustion. The motion was granted in part, Payton returned to state court to present the unexhausted claims, and the federal proceedings were held in abeyance. On December 11, 1997, the California Supreme Court denied the second state habeas petition. Payton filed an amended federal petition on January 30, 1998. Respondent filed an answer on May 15, and Payton filed a traverse on September 18, 1998.

III. Analysis

A. Claim 3(A)(8) - Failure To Investigate And Present Evidence Of Post-Traumatic Stress Disorder

Payton contends that his trial attorney, James Merwin, should have investigated and presented evidence that he suffered from PTSD at the time of the crimes. (Amended Petition for Writ of Habeas Corpus ["Pet."] at 36-41.)

To prevail on a claim of ineffective assistance of counsel, Payton must establish that counsel's performance was deficient and that the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish deficient performance, petitioner must show that counsel made errors so serious that his performance fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. To establish prejudice, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Trial counsel has a duty to investigate a defendant's mental condition when there is evidence of impairment. Evans v.

Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (counsel's failure to pursue the possibility of establishing [his client's] mental instability constituted deficient performance); see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (counsel has a duty "to seek psychiatric evaluation of a client where the grounds of a mental defense are apparent").

Merwin's investigation of a mental state defense at the guilt phase was reasonable. He consulted with three experts before deciding not to present a mental state defense. Payton, 3 Cal.4th at 1078. He provided the experts with a substantial amount of information relating to Payton and two of the experts actually interviewed him. All of the experts concluded that Payton did not have a viable mental state defense. In addition, each of the experts' reports contained damaging information about petitioner and his past actions. An attorney "is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense." Hendricks, 70 F.3d at 1038. Therefore, Merwin's decision not to pursue such a defense was a reasonably informed strategic decision and such decisions are "virtually unchallengeable." Strickland, 466 U.S. at 690. This subclaim is DENIED.

B. Claim 3(A)(22) - Violation Of Attorney-Client Privileges

Payton contends that Merwin violated the attorney-client privilege "by failing to make a confidential application for funds, under seal, in order to retain experts." (Pet. at 102.)

Prior to trial, Merwin sought the appointment of three mental health experts. (CT 80-82.) The orders appointing the experts were made part of the court file. Payton contends that Merwin violated the attorney-client privilege because he did not ask that the orders be made confidential pursuant to California Penal Code § 987.9.

Even if Merwin was found to have violated the attorney-client privilege, any error was harmless. In the habeas context, an error is harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). Even if the prosecution had been forewarned that Merwin was contemplating a mental state defense, any breach of confidentiality was harmless because Merwin did not call any of the experts to testify. Any information that the prosecution could have obtained from reviewing the orders appointing the experts was useless. This subclaim is DENIED.

C. Claim 3(C) - Actual Innocence

Payton argues that he is innocent of the rape charge and argues that a DNA analysis of the physical evidence of the crime will prove his innocence.

In Herrera v. Collins, 506 U.S. 390, 400 (1993), the Supreme Court held that claims of actual innocence "based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the course of the underlying state criminal proceedings." The Court stated that executive clemency was the appropriate forum to present claims of actual innocence.

Payton has not established a constitutional violation in the underlying trial. A federal writ of habeas corpus is only proper where a prisoner is "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241. Therefore, Payton has not raised a cognizable claim on federal habeas.

In addition, persuasive evidence of rape was presented at trial. The victim was found in her bedroom wearing only a

nightgown which was open in front, saliva consistent with Payton's was found on her breast, semen found in her vagina was consistent with Payton's, he had blood on his penis and pubic area when he returned home, and he had fingernail marks on his back. A fellow prisoner also testified that Payton admitted raping the victim. Payton, 3 Cal. 4th at 1058.

Based on the foregoing, this claim is DENIED.

D. Claim 3(D)- Trial Court Errors

1. Claim 3(D)(1) and (7) - Denial of Right to be Present

In these claims, Payton argues that his constitutional rights were violated because several discussions were held between defense counsel, the prosecutor, and the trial court. These discussions were not recorded and Payton was not present during the discussions. (Pet. at 112-13; 117-19.)

Due process guarantees a defendant the right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunities to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934). "That right is not absolute, however, and even involuntary absence may be harmless error." Id. Therefore, the Court must determine whether Payton's absence had a "substantial and injurious effect or influence on the jury's verdict." Brecht, 507 U.S. at 638.

The Court has considered all of the proceedings identified by Payton in support of the claim that he was absent during crucial proceedings at trial. (Pet. at 118.) Payton has failed to establish that his absence at any of these discussions or proceedings had a "substantial and injurious effect or influence

effect or influence on the jury's verdict." Brecht, 507 U.S. at 638. Therefore, this subclaim is DENIED.

In a related claim (Claim 3(F)), Payton contends that appellate counsel failed to obtain a settled statement of the record and that the unreported conversations "could have been reconstructed at the time of the settling of the record, which is an obligation of both Petitioner's trial and appellate counsel." (Pet. Brief at 20.) However, petitioner has failed to establish either deficient performance or prejudice on the part of appellate counsel. Therefore, this claim is also DENIED.

2. Claims 3(D)(2), (3) and (4) - Failure to Properly Instruct the Jury on Jailhouse Informant Testimony

Payton contends that the trial court should have instructed the jury that his conviction could not be based on the uncorroborated testimony of a jailhouse informant and that the testimony of an informant should be viewed with suspicion. He also contends that the trial court should have instructed the jury on the factors involved in weighing the credibility of informant testimony. (Pet. at 114-16.)

The Court will not review this claim to determine if the jury instructions were proper under state law. A faulty jury instruction compels the issuance of a writ only where "' the ailing instruction so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughton, 414 U.S. 141, 147 (1973)).

Payton has failed to establish that the failure to give the instructions he contends should have given rendered his trial fundamentally unfair. There was sufficient evidence of rape for the jury to convict on that charge even if they had been told to

treat the informant's testimony with caution. In addition, the instructions that were given were adequate to guide the jury's assessment of the witnesses, including the informant. The jurors were instructed that they were the sole judges of the credibility of a witness (CT 223), that they could consider the existence of a bias, interest or other motive of a witness (CT 223), that they could consider the witness' prior conviction of a felony (CT 224, 227), and that "evidence of an oral admission of the defendant should be viewed with caution." (CT 234.) Therefore, the failure to provide additional instructions relating to informant testimony did not render the trial unfair. This claim is DENIED.

3. Claim 3(D) (5) - Trial Court Refused to Instruct on Diminished Capacity

In this claim, Payton argues that evidence was presented at trial that he had consumed alcohol on the night of the murder and that he exhibited signs of intoxication. (Pet. at 116.) However, according to Payton, the trial court erred in failing to give an instruction to the jury "which would have allowed them to apply the diminished capacity defense to [his] ability to premeditate, deliberate, harbor malice or form the specific intent to kill." (Pet. at 116.)

The Court found the California Supreme Court's analysis of this claim persuasive. Therefore, for the reasons stated by the California Supreme Court, this claim is DENIED. See Payton, 3 Cal. 4th ast 1060-62.

4. Claim 3(D)(6) - Reasonable Doubt Instruction

The reasonable doubt instruction given at trial is constitutional. Victor v. Nebraska, 511 U.S. 1, 22-23 (1994). This subclaim is DENIED.

E. Claim 3(E) - Prosecution Was Not Required To Prove All Elements Of The Crimes

Payton contends that this claim is foreclosed by Tyson v. Arizona, 481 U.S. 137 (1987), therefore, this claim is DENIED.

F. Claim 3(G) - Cumulative Error

None of the remaining alleged instances of error, either individually or in the aggregate, warrant habeas relief as to the guilt phase. Therefore, this claim is DENIED.

IV. Order

The penalty phase of Payton's trial was rendered fundamentally unfair by the prosecutor's improper argument regarding the jury's consideration of mitigating evidence. Therefore, a writ of habeas corpus shall issue VACATING and SETTING ASIDE the sentence of death in the case of People v. Payton, Case No. C-45040, unless, within 120 days of the entry of judgment herein, the State of California grants Payton a new penalty trial. If no retrial is held, Payton shall be sentenced to life in prison within the possibility of parole. Payton's convictions for murder, rape, and attempted murder remain valid.

IT IS SO ORDERED.

Dated: December 17, 1999.

/S/
Manuel L. Real
United States District Judge

APPENDIX F

APPENDIX F

[Filed November 23, 1992]

THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM CHARLES PAYTON, Defendant and Appellant.	No. S004437 Crim. Nos. 22511/25552 Orange County Superior Court Case No. C-45040
In Re WILLIAM CHARLES PAYTON, On Habeas Corpus.	S056446

COUNSEL:

Ellen Bailer Fondiler, Barry L. Levin, Stamp & Franklin and Joel Franklin for Defendant and Appellant and Petitioner. John K. Van de Kamp and Daniel E. Lungren, Attorneys General, Steve White and Richard B. Iglehart, Chief Assistant Attorneys General, Harley D. Mayfield, Assistant Attorney General, Frederick R. Millar, Jr., Jay M. Bloom, Holly D. Wilkens, John W. Carney and Esteban Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Arabian, J., with Lucas, C. J., Panelli, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Kennard, J., with Mosk, J., concurring.

OPINION BY: ARABIAN, J.

OPINION:

A jury convicted defendant of the 1980 first degree murder and rape of Pamela Montgomery, and the attempted murders of Patricia Pensinger and Patricia's son, Blaine Pensinger, all counts with the use of a butcher knife. (Pen. Code, §§ 187, 261, subd. (2), 664, 12022, subd. (a).)[1] The jury also found true the special circumstance allegation that the murder was committed while engaged in the commission or attempted commission of rape. (§ 190.2, subd. (a)(17)(iii).) After a penalty trial, the jury imposed the death penalty. The court denied defendant's automatic motion to modify the verdict. (§ 190.4, subd. (e).) This appeal is automatic. (§ 1239.)

Defendant filed a separate petition for a writ of habeas corpus alleging that a psychological defense based upon his "combat experiences" in Vietnam should have been presented at trial. We issued an order to show cause, and consolidated the matter with the appeal. A referee presided over an evidentiary hearing, and has issued his report.

We affirm the judgment and deny the petition.

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

I.

THE APPEAL

A. *The Facts*

1. *Guilt Phase*

Patricia Pensinger lived in Garden Grove with her three sons, including 10- year-old Blaine, and some boarders. One boarder, Pamela Montgomery, had moved into the house two days earlier. She was living there while her husband was on duty with the National Guard. Defendant and his wife had also been boarders at one time.

Around 4 a.m., May 26, 1980, Patricia, unable to sleep, was sitting in her kitchen working on a crossword puzzle. She heard the front door open, and then saw defendant enter the kitchen. Defendant said that he had car problems and wanted to talk to Patricia. She offered him a beer, and the two talked for a while. At one point, Pamela Montgomery entered the kitchen briefly to get a glass of water. Patricia introduced defendant to Pamela. After Pamela left the kitchen, defendant and Patricia continued talking. Defendant drank a total of three beers. Eventually, around 4:50 a.m., defendant asked Patricia if he could sleep on her couch in the living room. She agreed, and then went to sleep in her bedroom. Blaine was also sleeping in her bed.

Patricia was awakened some time later by "two blows on [her] back." She rolled over in time to see defendant jump onto the bed on top of her. He stabbed her repeatedly with a knife, primarily on the face and neck. Blaine woke up, and tried to take the knife away from defendant, but defendant also stabbed him. Patricia yelled, "Take me, leave my son." Defendant tried to stab her in the abdomen, then tried a second and a third time to stab her; the knife blade had bent, and would not penetrate.

Defendant got off the bed and left the room, yelling, "I'm leaving now."

Patricia told Blaine that she would try to keep defendant busy and that he should try to escape. She went into the kitchen, and saw defendant. The knife he had used was lying on the counter. Defendant reached for a second knife, and stabbed Patricia in the back. Blaine ran through the kitchen. As he ran past, defendant also stabbed him in the back. Defendant then resumed stabbing Patricia. Another son woke up by this time. Patricia yelled for her sons to awaken a male boarder. Defendant dropped the second knife on the kitchen floor, and fled the house through the front door.

Patricia suffered 40 stab wounds to her face, neck, back and chest. Blaine suffered 23 stab wounds to his face, neck and back. Both survived.

Not so fortunate was Pamela Montgomery. Her body, clad only in a nightgown that was open in the front, was found lying in a pool of blood on her bedroom floor. The body had 12 stab wounds, including 6 in a line from above the stomach to the pubic area. Three of the latter wounds alone would have been fatal. There were also some "defense wounds" sustained when the victim tried to defend herself. The victim had been dead about 15 to 30 minutes before the body was discovered.

Blood was found in various places in the bedroom and in a nearby bathroom. A pair of panties entwined around some shorts were found on the victim's bed. Saliva consistent with defendant's (and with that of a sizable portion of the general population) was found on the victim's breast. Semen that could have come from defendant was found in the victim's vaginal area. Defendant's fingerprint was found on a beer bottle in the kitchen.

After fleeing the Pensinger house, defendant went home, arriving around 6:15 a.m. Defendant's wife, Deborah Payton, waived the privilege not to testify against her husband, and testified that defendant's clothes, face, and hands were covered with blood. Some of the blood was still wet. His index finger was cut. When defendant removed his clothes, she observed that his genital area was covered with a "lot" of blood, as were his legs, chest and other parts of his body. His body contained scratches and what Deborah described as "fingernail digs," as if "somebody had applied quite a bit of pressure with fingernails."

Defendant and his wife left town that morning. Defendant was eventually arrested in Florida.

While in the Orange County jail, defendant told a fellow inmate about the crime. He said he raped and stabbed a woman, then stabbed a boy and the boy's mother. Defendant said he had "this urge to kill."

The defense presented no guilt phase evidence.

2. *Penalty Phase*

The prosecution presented evidence that in 1973, defendant stabbed a woman he was living with repeatedly in the chest and arm. A county jail inmate testified that defendant told him about the crimes committed in the Pensinger house. As a reason for the crimes, defendant said that he had a "severe problem with sex and women," and that he would "stab them and rape them." Defendant said "that all women on the street that he seen was a potential victim, regardless of age or looks."

The parties stipulated that defendant had suffered two prior felony convictions, both in 1976, one in Idaho for possession of over three ounces of marijuana, and one in Oregon for unlawful consensual sexual intercourse with a minor under the age of eighteen.

The defense presented evidence that defendant had become a religious person since his arrest and custody in jail. His mother testified that he was "totally immersed in the Lord." A minister who had known defendant for many years believed that his recent "commitment to the Lord" was sincere. A mission director testified about defendant's religious conversion and the good qualities he exhibited in jail. Defendant had established Bible study classes in jail, and had almost completed an autobiography that had an "excellent chance of being published in an international ... Christian publishing house." Many jail inmates "respect him and trust him and have a confidence in him." He hoped to develop a "ministry within the prison system" that would rehabilitate people. A deputy sheriff testified that defendant led Bible study sessions in jail, and had a positive influence on other inmates. Four fellow inmates testified about defendant's beneficial influence in jail.

B. *Discussion*

1. *Guilt Phase*

(a) *Instruction Regarding Informant's Testimony*

(1) Defendant contends the trial court erred by failing to instruct on its own motion that the testimony of a jailhouse informant should be viewed with suspicion and distrust, and that such testimony is inherently unreliable. We have repeatedly rejected similar contentions. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1209-1210 [275 Cal.Rptr. 729, 800 P.2d 1159], and cases cited therein.) Defendant was given full opportunity to explore in front of the jury any motive to cooperate or other bias on the part of all the witnesses, including the jailhouse informant. The standard instructions on judging the credibility of witnesses adequately guided the jury's assessment of the jailmate's testimony. (*Ibid.*)[2]

Defendant also argues that the jury should not convict on the basis of uncorroborated testimony of informants. (Cf. § 1111 [accomplice testimony must be corroborated].) Neither we nor the Legislature has created such a requirement, but we need not resolve the question here, for the informant's testimony formed but a small part of the overall strong evidence against defendant. (See *People v. Alcala* (1984) 36 Cal. 3d 604, 624, fn. 10 [205 Cal.Rptr. 775, 685 P.2d 1126].)

(b) *Instructions On Diminished Capacity*

(2) Defendant contends the court's instructions on diminished capacity were insufficient.[3] As in *People v.*

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[2]Section 1127a, subdivision (b), enacted long after the trial in this case, now requires the court to give a specified cautionary instruction upon request. (See *People v. Gonzalez, supra,* 51 Cal.3d at p. 1210, fn. 5.) Even if that statute had been in effect at the time of trial, it would not help defendant's position, for here there was no request.

[3]After the instant crimes were committed, the Legislature abolished the defense of diminished capacity. (See *People v. Saille* (1991) 54 Cal.3d 1103 [2 Cal.Rptr.2d 364, 820 P.2d 588].) That legislation does not apply retroactively to this case. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241 [278 Cal.Rptr. 640, 805 P.2d 899] [that the name is the same as the victim-witness in this case is coincidental].)

Frierson (1979) 25 Cal.3d 142, 155-157 [158 Cal.Rptr. 281, 599 P.2d 587], we disagree for three reasons: (1) there was insufficient evidence to warrant diminished capacity instructions at all, (2) the instructions the court did give were sufficient, and (3) any error was harmless given the actual verdicts.

(2) Defendant relied solely on the following testimony of Patricia Pensinger to support the diminished capacity claim. Defendant drank three beers while they talked in the kitchen. Defendant "had a funny way of shuffling his feet when he walks when he gets overly tired or when he was drinking." He exhibited that symptom that night. Also his speech was "slower, more precise than what his normal speaking voice was." However, he had no trouble walking, and his speech was otherwise fine. He knew what he was talking about, and he could respond. At the time of the stabbing, his reflexes, coordination and balance seemed normal.

"This evidence does not amount to substantial evidence that defendant lacked the capacity to form the requisite mental states, when we compare this case with others in which we have dismissed evidence of diminished capacity as insubstantial." (*People v. Pensinger*, *supra*, 52 Cal. 3d at p. 1241, 278; see also the cases cited therein.) For example, in *People v. Rodriguez* (1986) 42 Cal.3d 730, 762 [230 Cal.Rptr. 667, 726 P.2d 113], there was testimony that the defendant had been drinking and had "had 'a lot' " of cocaine, and that he was " 'under the influence' " in that he was " 'talkative and really hyper.' " We found that this "testimony lent only minimal and insubstantial support to appellant's theory of diminished capacity from intoxication and therefore was not sufficient to justify the requested instruction." (*Ibid.*)

The same is true here. There was no evidence that the three beers affected defendant's ability to think in any way.

"[D]efendant presented no evidence whatever, expert or otherwise, regarding the intoxicating effect, if any, which his use of ... [the beer] may have had upon his ability to form the necessary intent" to commit the crimes. (*People v. Frierson, supra,* 25 Cal.3d at p. 156, 158 Cal.Rptr. 281, 599 P.2d 587.)

Defendant contends that because the trial court did give some instructions on diminished capacity, there must have been evidence to support the theory. We have previously rejected the contention. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1242, 278 Cal.Rptr. 640, 805 P.2d 899; *People v. Frierson, supra,* 25 Cal.3d at p. 157, 158 Cal.Rptr. 281, 599 P.2d 587.)

(3) Even if there had been sufficient evidence to warrant instructions on diminished capacity, the instructions given were adequate. The court gave modified versions of former CALJIC Nos. 3.35 ("Diminished Capacity to Form Specific Mental State"), 4.21 ("Voluntary Intoxication--When Relevant to Specific Intent"), 4.22 (1979 rev.) ("Voluntary Intoxication--Defined"), and 8.79 ("Diminished Capacity to Form Requisite Specific Intent to Commit Underlying Crime in Felony Murder").[4] Defendant also requested former CALJIC No. 8.77 ("Diminished Capacity--Ability to Premeditate, Deliberate, Harbor Malice, or Intend to Kill"). The court refused the request on the basis that the content was covered by CALJIC No. 3.35.

Defendant contends that because the court did not give CALJIC No. 8.77, the jury was "only instructed on the diminished capacity defense as it related to appellant's ability to form the specific intent for murder [citation] and his ability to form the specific intent to commit the underlying crime in the felony murder. [Citation.] The jury was never informed that they could also apply the diminished capacity evidence to

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[4]All CALJIC citations are to the fourth edition.

appellant's ability to premeditate, deliberate or harbor malice." A review of the instructions given belies the contention.

The jury was told that it had to determine whether defendant's mental or physical condition "prevented him from forming the specific intent or mental state essential to constitute the crime or degree of the crime with which he is charged." The court fully instructed on all the necessary specific intents and mental states for all the offenses, including first degree murder. Thus, "the jurors were told in unequivocal language that intoxication could have prevented defendant from forming the requisite specific intent for *each* of the various crimes charged." (*People v. Frierson, supra,* 25 Cal.3d at p. 155, italics in the original.)

(4) Finally, any error was harmless. The jury was instructed on two theories of first degree murder: premeditated and felony murder. Defendant does not deny that the court correctly instructed on diminished capacity as it related to the felony-murder rule. The jury found true the rape-murder special circumstance. It "thus necessarily found the killing was committed in the course of a rape or attempted rape," a theory upon which the jury was correctly instructed. (*People v. Kelly* (1992) 1 Cal.4th 495, 531 [3 Cal.Rptr.2d 677, 822 P.2d 385].) We thus can determine that the murder "verdict rested on at least one correct theory." (*Ibid.*)

(c) *Validity of Felony-murder Rule*

Defendant contends that the felony-murder rule is unsound and unconstitutional. We have rejected the contention. (*People v. Silbertson* (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152, 709 P.2d 1321]; *People v. Dillon* (1983) 34 Cal.3d 441, 472-476 [194 Cal.Rptr. 390, 668 P.2d 697].)

(d) *Special Circumstance Contentions*

Defendant contends that felony-based special circumstances, such as the rape- murder special circumstance of this case, are unconstitutional. They are not. (*Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127, 107 S.Ct. 1676]; *Cabana v. Bullock* (1986) 474 U.S. 376, 386, [88 L.Ed.2d 704, 106 S.Ct. 689]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1140-1147 [240 Cal.Rptr. 585, 742 P.2d 1306].)

Defendant also contends the court erred in failing to instruct the jury on the requirement of an intent to kill. (*Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862].) However, an intent to kill is no longer an element of a felony-based special circumstance if the defendant is the actual killer. (*People v. Anderson, supra,* 43 Cal.3d at pp. 1147-1148, overruling *Carlos v. Superior Court, supra,* 35 Cal.3d 131.) "In this case, there is no issue of accomplice liability; the jury necessarily found that defendant was the actual killer." (*People v. Johnson* (1988) 47 Cal.3d 576, 602 [253 Cal.Rptr. 710, 764 P.2d 1087].) Accordingly, there was no requirement of an intent to kill. (*People v. Poggi* (1988) 45 Cal.3d 306, 326 [246 Cal.Rptr. 886, 753 P.2d 1082].) Contrary to defendant's contentions, the *Anderson* rule applies to this pre-*Carlos* crime. (*Poggi, supra,* at pp. 326-327).

2. *Penalty Phase*

(a) *Jury Selection*

(5) Defendant contends the court erred in excusing for cause two prospective jurors because of their views on the death penalty. It is settled that the trial court may excuse prospective jurors for cause if those jurors' views on the death penalty would prevent or substantially impair the performance of their

duties as jurors in accordance with their instructions and their oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, [83 L.Ed.2d 841, 851-852, 105 S.Ct. 844]; *People v. Cooper* (1991) 53 Cal.3d 771, 809[281 Cal.Rptr. 90, 809 P.2d 865].) "On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding." (*Cooper, supra,* at p. 809.)

The record supports the trial court's rulings. The first juror said, "I think I would always vote for life imprisonment." She agreed that there was "no way" she could recommend the death penalty. The second juror said he would "automatically" vote for life. Defense counsel got him to say that he could vote for death "in the most aggravated case you can imagine." But his state of mind would make it "very difficult" for him to be fair to the state at a penalty phase. He later said that he did not think he could vote for death. These responses support the court's removal of these jurors. (*People v. Cooper, supra,* 53 Cal.3d at pp. 808-810.)

(b) *Issues Involving Informant Testimony*

Defendant contends the penalty phase testimony of the jailhouse informant regarding defendant's statements about stabbing and raping women, and about all women being potential victims, was improperly admitted. He claims use of uncorroborated informant testimony unconstitutionally undermines the reliability of the penalty determination. We have already rejected this contention. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1250, fn. 13.) In addition, the independent evidence of defendant's crimes corroborated the informant's testimony. (*People v. Alcala, supra,* 36 Cal.3d at p. 624, fn. 10.)

(6) Defendant also contends the court should have excluded the evidence under Evidence Code section 352, and that it was impermissible evidence of future dangerousness. We find, however, no abuse of discretion in admitting the evidence. (*People v. Green* (1980) 27 Cal.3d 1 [19, 164 Cal.Rptr. 1, 609 P.2d 468].) Evidence of statements from defendant's own mouth demonstrating his attitude toward his victims was highly probative. Contrary to defendant's argument, the record shows that the court properly weighed the probative value against the prejudicial effect. Although we have generally condemned *expert* predictions of the defendant's future dangerousness because of their inherent unreliability (*People v. Murtishaw* (1981) 29 Cal.3d 733, 774 [175 Cal.Rptr. 738, 631 P.2d 446]; see *People v. Daniels* (1991) 52 Cal.3d 815, 882 [277 Cal.Rptr. 122, 802 P.2d 906]), we have consistently upheld prosecution argument of future dangerousness based on the evidence. (*People v. Bell* (1989) 49 Cal.3d 502, 549 [262 Cal.Rptr. 1, 778 P.2d 129]; *People v. Davenport* (1985) 41 Cal.3d 247, 288 [221 Cal.Rptr. 794, 710 P.2d 861].) The evidence was properly admitted.

(7) Defendant finally contends the court had a sua sponte duty to instruct the jury that evidence of his oral admissions should be viewed with caution. We reject the contention for two reasons. First, the instruction *was* given at the guilt phase; at the penalty phase, the court told the jury that it would be given the guilt phase instructions "to use if applicable in the penalty phase ...." This sufficed even if the instruction had been required. (*People v. Cooper, supra,* 53 Cal.3d at p. 846.) Second, there is no sua sponte duty to give the instruction at the penalty phase. (*People v. Livaditis* (1992) 2 Cal.4th 759, 782-784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

(c) *Cross-Examination of Defense Witnesses*

Defendant contends the court erred in allowing the prosecutor to ask some of the defense witnesses questions regarding defendant's activities in jail. The questions received some negative responses and some positive responses. Since the record reflects a good faith basis for the questions, and they were relevant to impeach the defense testimony, we find no error.

(i) *Factual Background*

Phillip Arellano, a fellow jail inmate of defendant, testified about defendant's religious faith and "very good influence" on other inmates. At the end of the direct examination, the district attorney sought permission to ask on cross-examination if the witness had observed defendant gambling and extracting money from other prisoners in return for things such as telephone privileges. The questions would be based on information supplied by the two jail informants who had testified previously. The prosecutor did not want to call those witnesses again on rebuttal, but stated he would if necessary. When defendant objected to the questions, a hearing was held outside the presence of the jury.

Arellano testified at the hearing that he had seen defendant gambling but had not seen him extracting money from other prisoners. Defendant withdrew his objection to questions about gambling, but reiterated it regarding extracting money. The court overruled the objection on the basis that the "answers are in the negative." In front of the jury, Arellano repeated that he had seen defendant gamble, but had not seen him extracting money. The district attorney later asked another fellow inmate testifying for the defense the same questions; each question elicited a negative response.

Upon a further defense objection, the court indicated it was allowing the questions because the district attorney stated he had a factual basis for the questions, and that they "would go to the bias and prejudice" of the witnesses. The district attorney reiterated that the questions were based on "information from at least two witnesses." He had not yet decided whether he was going to call those two witnesses on rebuttal. The court then stated that a new hearing should be held if the district attorney intended to ask future witnesses similar questions.

Another hearing was held outside the presence of the jury prior to the testimony of the next defense witness. The prosecutor stated that, if the witness also testified about defendant's religious beliefs, he wanted to ask the questions about defendant's gambling and extracting money, and also about whether defendant had engaged in mutual combat in jail and had planned an escape. The court ruled that the probative value of the latter questions was outweighed by the prejudicial effect, and it excluded them. It also ruled that it would not allow the questions about gambling and extracting money unless the district attorney presented in rebuttal the witnesses who supplied the information. Otherwise, the court was concerned that "if we keep asking the questions in the negative, we're getting into an area which will create a problem unless we have some rebuttal witnesses." The district attorney responded that he was not sure if the rebuttal evidence was important enough to present. When the next witness indicated he would give negative answers to all the questions, the court disallowed them under Evidence Code section 352.

The court later stated that if the defense elicited testimony that defendant was a "calming influence" on fellow inmates, it would allow questions concerning defendant engaging in mutual combat. In response to the ruling, defense counsel stated that he would not call a certain witness.

The next defense witness was Deputy Sheriff Engen. Engen testified that defendant was a positive influence on other inmates. On cross-examination, the district attorney asked if it had been brought to his attention that defendant "was extracting commissary from other prisoners for phone calls." The witness answered that "yes," one inmate had told him that. On redirect examination, Engen testified that defendant had the "ability to calm the other inmates." On recross-examination, the prosecutor asked if the witness was aware of defendant "ever engaging in mutual combat with other prisoners while you were on duty ...." He responded, "No, not while I was on duty."

The next day, a juror sent the court a note stating, "The prosecution mentioned extracting money for phone calls. Please ask him to explain what that means." Defendant moved to "strike that part of the testimony" and to prohibit the prosecutor from arguing it; he also asked that the jury "request not be answered." The court denied the request to strike the testimony, but "in an abundance of caution" instructed the prosecutor not to comment on it in argument. The court did not respond to the juror's note.

(ii) *Analysis*

Defendant contends the court erroneously allowed the questions of the two inmate witnesses regarding gambling and extracting money (eliciting one positive response from one witness regarding gambling; the rest of the responses were negative), and the questions of the deputy sheriff regarding extracting money (eliciting a positive response) and mutual combat (eliciting a negative response). He also contends the court should have responded to the jury note. We discuss his several arguments in order.

(8) Defendant first contends the evidence did not come within one of the aggravating factors of section 190.3. The

evidence, however, was not introduced in aggravation but to impeach the defense evidence. "We have previously observed that such impeachment is permissible when character evidence is introduced at the penalty phase. As we observed in *People v. Siripongs* (1988) 45 Cal.3d 548 [247 Cal.Rptr. 729, 754 P.2d 1306]: 'It is well established that, "[w]hen a defense witness, other than the defendant himself, has testified to the reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony." (*People v. Wagner* (1975) 13 Cal.3d 612, 619 [119 Cal.Rptr. 457, 532 P.2d 105].) So long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place, they may so inquire.' (*Id.* 45 Cal.3d at p. 578.) Thus, we 'reject[ed] defendant's claim that cross-examination under Evidence Code section 1102 is impermissible at the penalty phase whenever character testimony is introduced in mitigation rather than to show conformity with a particular character trait. A defendant has no right to mislead the jury through one-sided character testimony during either the guilt or penalty trial. We do not believe that defendant was entitled to elicit testimony suggesting that he was honest, and at the same time to preclude the People from introducing contrary evidence.' (*Ibid.*)" (*People v. Fierro* (1991) 1 Cal.4th 173, 239 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

Similarly, the questions here were appropriate to impeach the testimony about defendant's religious conversion and calming influence in jail. Defendant claims the evidence was not introduced as rebuttal, citing the district attorney's uncertainty whether he would present the jailhouse informants as rebuttal witnesses (he ultimately did not). However, the questions were clearly intended to impeach the defense witnesses, and were admitted for that purpose. It did not matter that they were asked on cross- examination during the defense

portion of the trial rather than during the prosecution's rebuttal portion. (See *People v. Fierro, supra,* 1 Cal.4th at p. 239.)

Defendant next complains that he was not given advance notice of the evidence in violation of the notice requirement of section 190.3. Since he did not object on that basis at trial, the issue is not cognizable on appeal. (*People v. Cooper, supra,* 53 Cal.3d at p. 842; *People v. Carrera* (1989) 49 Cal.3d 291, 334 [261 Cal.Rptr. 348, 777 P.2d 121].) Moreover, no notice is required when the evidence is introduced to rebut defense mitigating evidence. (§ 190.3; *People v. Harris* (1981) 28 Cal.3d 935, 961 [171 Cal.Rptr. 679, 623 P.2d 240].)

Defendant contends the questions were not asked in good faith. The record does not support the contention. The district attorney stated the factual basis for the questions. Defendant did not claim there was no factual basis. He did not, quite reasonably, insist that the informants supplying the information actually testify on rebuttal. The positive responses that were elicited as to two of the questions also support the claim of good faith.

Defendant contends the questions of Deputy Engen violated a court order that they not be asked without a further in camera hearing. We disagree. At one point, the court did indicate a new hearing should be held before such questions were asked. Thereafter, a new hearing *was* held, and the court made further rulings. It did not indicate that yet another hearing would be required. The record is not clear whether the question regarding extracting money came within the rulings, although the question regarding mutual combat clearly was permitted. If defendant believed any question violated the court's ruling, he should have objected at that time. He did not. Upon an objection, a hearing could have been held. Since the witness gave a positive answer to the question about extracting money, the court undoubtedly would have allowed it. Indeed, when

defendant did object the next day, the court refused to strike the testimony.

Defendant also contends that the *form* of the questions was improper. He claims that questions admissible under Evidence Code section 1102 must be prefaced by the words "have you heard." Defendant did not object on that basis; the issue is thus not cognizable on appeal. (*People v. Green, supra,* 27 Cal.3d at p. 22 & fn. 8.) In any event, penalty phase cross-examination of defense witnesses in mitigation is not so restricted. (*People v. Fierro, supra,* 1 Cal.4th at p. 239.)

(9) Finally, defendant contends the court was required to respond to the juror's note. Although the court must respond to jury questions during deliberations regarding "any point of law arising in the case" (§ 1138; see *People v. Beardslee* (1991) 53 Cal.3d 68, 97 [279 Cal.Rptr. 276, 806 P.2d 1311]), the note had nothing to do with the law, but with a fact. The juror merely requested that the prosecutor be asked to explain what "extracting money for phone calls" means. Although defense counsel asked that the testimony be stricken, he also asked "for an order directing the prosecutor not to argue it and ... that this request not be answered ...." Defendant obviously did not want the jury given a further explanation of this evidence. The court granted these defense requests, which effectively precluded any response to the note. The issue has thus been waived on appeal. (*People v. Thoi* (1989) 213 Cal.App.3d 689, 698 [261 Cal.Rptr. 789].) Given the nature of the note--a request of the prosecutor, not the court--we also find no error.

(d) *Contentions Regarding Other Crimes Evidence*

Defendant raises a number of contentions regarding the evidence of other crimes, most of which we have already rejected. Admission of prior unadjudicated crimes does not deny him due process or a reliable death judgment. (*People v. Medina* (1990) 51 Cal.3d 870, 906-907 [274 Cal.Rptr. 849, 799 P.2d 1282]; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205 [222 Cal.Rptr. 184, 711 P.2d 480].) The court is not required to instruct the jury that it could consider other crimes evidence only if it *unanimously* found such crimes had been proved beyond a reasonable doubt. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1273 [270 Cal.Rptr. 451, 792 P.2d 251].) The court is not required to enumerate the other crimes that the jury should consider or to instruct on the elements of those crimes. (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207 [5 Cal.Rptr.2d 796, 825 P.2d 781].)

The court told the jury at the penalty phase that it would be given the guilt phase instructions "in the jury room to use if applicable in the penalty phase of this trial." It also instructed, "As to evidence of other crimes committed by the defendant not charged in this case, such offenses before they can be considered must be proven to you beyond a reasonable doubt, as has previously been defined to you." The court refused defendant's request to repeat the entire reasonable doubt instructions. Such instructions were given at the guilt phase.

Defendant contends the court was required to repeat all of the reasonable doubt instructions at the penalty phase. We disagree. The specific reference to the guilt phase instructions, which were made available to the jury, sufficed. (See *People v. Cooper, supra,* 53 Cal.3d at p. 846; *People v. Brown* (1988) 46 Cal.3d 432, 460 [250 Cal.Rptr. 604, 758 P.2d 1135].)

(c) *Instructions and Argument on Mitigating Evidence--Section 190.3, Factor (k)*

(10a) Defendant contends that the trial court's instructions and the prosecutor's argument led the jurors to believe, incorrectly, that they were not permitted to consider defendant's mitigating evidence. Our review of the record does not support the contention.

As already mentioned, defendant's case in mitigation consisted of evidence to the effect that he had experienced a religious conversion in prison and had subsequently behaved well. To present this case defendant called eight witnesses, including his pastor, a deputy sheriff who testified that defendant had a calming effect on other prisoners, four inmates who testified to defendant's sincerity, including one who testified that defendant had persuaded him not to commit suicide, defendant's mother, and the director of a religious organization that ministered to prisoners.

At the close of the penalty phase the trial court instructed the jury in the language of section 190.3, factor (k) (hereafter, factor (k)). Thus, the jurors heard that they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The trial court denied defense counsel's request to modify the instruction to refer specifically to "evidence of the defendant's character, background, history, mental condition and physical condition." Although the court agreed with counsel that factor (k) was a catch-all provision and permitted the jury to consider such evidence, the court expressed "reluctan [ce]" to "change a CALJIC instruction" that followed the statute "verbatim."

During closing argument, the prosecutor incorrectly argued that factor (k) referred to "some factor at the time of the offense

that somehow operates to reduce the gravity for what the defendant did" but not "to anything after the fact or later." On appeal, defendant contends that the jurors probably accepted the prosecutor's interpretation of factor (k) and, thus, disregarded the extensive testimony about defendant's religious conversion.

In essence, defendant asserts the type of claim that we addressed in *People v. Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813]. In that case, which we decided two years after defendant's trial, we recommended that courts in the future adorn factor (k) with the explanatory gloss that juries are permitted to consider "any other 'aspect of defendant's character or record ... that the defendant proffers as a basis for a sentence less than death.' " (*Easley, supra,* 34 Cal.3d at p. 878, fn. 10.) Our recommendation was motivated by the argument that a jury instruction in the language of factor (k) would violate the federal Eighth Amendment if understood by the jury as barring consideration of character and background evidence. The Eighth Amendment, of course, requires that the sentencer be permitted to consider such evidence. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112 [71 L.Ed.2d 1, 102 S.Ct. 869]; *Lockett v. Ohio* (1978) 438 U.S. 586, 602-609 [57 L.Ed.2d 973988-993, 98 S.Ct. 2954]; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-9 [90 L.Ed.2d 1, 6-9, 106 S.Ct. 1669] [regarding good behavior in prison].)

(11) Since our decision in *Easley,* however, the United States Supreme Court has held that the language of factor (k) satisfies the federal Eighth Amendment. (*Boyde v. California* (1990) 494 U.S. 370, 372, 377-386, 108 L.Ed.2d 316, 324, 326-333, 110 S.Ct. 1190] (*Boyde*).) The court reasoned that factor (k) does not, as the petitioner in that case argued, "limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' " (*Boyde, supra,* 494 U.S. at p. 382 [108 L.Ed.2d 330], italics in original.) Instead, the factor directs the jury "to consider *any other*

circumstance that might excuse the crime, which certainly includes a defendant's background and character." (*Ibid.,* italics in original.) The high court found its conclusion to be reinforced by the other sentencing factors, which "allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence." (*Id.,* at p. 383.)

To be sure, the high court's holding in *Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k). (*Boyde, supra,* 494 U.S. at p. 384 [108 L.Ed.2d at pp. 331-332].) However, in evaluating such claims we do not treat comments by attorneys as if they had the same force as the trial court's instructions on the law. This is because "[t]he former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter ... are viewed as definitive and binding statements of the law." (*Ibid.*)

Rather than creating a rule to the effect that incorrect remarks by attorneys about the permissible scope of mitigating evidence are presumed to have misled the jury, *Boyde* teaches that there is constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court's instructions as precluding consideration of relevant mitigating evidence offered by the defendant. (*Boyde, supra,* 494 U.S. at pp. 378-381, 386 [108 L.Ed.2d at pp. 327-330, 332-333.) *Boyde* also teaches that comments by attorneys "must be judged in the context in which they are made." (*Id.,* at p. 385 [108 L.Ed.2d at p. 332.) To the same effect, we have said that we will examine pre-*Easley* cases "on [their] own merits to

determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion ...." (*People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17 [230 Cal.Rptr. 834, 726 P.2d 516].) With regard to the standard of review in cases such as this, *Brown, supra,* 40 Cal.3d 512, and *Easley, supra,* 34 Cal.3d 858, should not be understood as requiring more or less than *Boyde, supra,* 494 U.S. 370.

(10b) Applying this analysis to the case before us, we do not consider it reasonably likely that the jurors believed the law required them to disregard defendant's mitigating evidence. Several considerations lead us to this conclusion.

It is true that the prosecutor during closing argument suggested a narrow and incorrect interpretation of factor (k). The factor, he told the jury, "says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some ... factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. [¶] It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity." Any impact this argument may have had, however, was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were "not evidence" but "argument," and "to be placed in [their] proper perspective." (Cf. *Boyde, supra,* 494 U.S. at p. 384 [108 L.Ed.2d at pp. 331-332] [recognizing that such comments "are likely viewed as the statements of advocates," especially when "billed in advance to the jury as matters of argument, not evidence"].)

Later in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it. The prosecutor also

suggested, properly, how the jury might weigh defendant's evidence against the evidence in aggravation. To quote: "The law in its simplicity is that ... if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty. [¶] How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, ... Blaine Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old. This is not close." Obviously, this exercise by the prosecutor had a point only if it was contemplated that the jury *would* consider defendant's evidence. (Cf. *People v. Mason* (1991) 52 Cal.3d 909, 965 [277 Cal.Rptr. 166, 802 P.2d 950], and *People v. Guzman* (1988) 45 Cal.3d 915, 957[248 Cal.Rptr. 467, 755 P.2d 917] [in which the attention paid by prosecutors in closing argument to defense evidence was found to have undercut suggestions that such evidence was not mitigating under factor (k)].)

For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde,* "that reasonable jurors would believe the court's instructions transformed all of [defendant's] 'favorable testimony into a virtual charade.' " (*Boyde, supra,* 494 U.S. at p. 383 [108 L.Ed.2d at p. 331].) The high court's observation is especially apt when the trial court, as here, has also instructed the jury to consider "all of the evidence which has been received during any part of the trial" in determining the penalty. (Ibid.)

Defense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence. (Cf. *People v. Guzman, supra,* 45 Cal.3d at p. 957 [holding that a prosecutor's comments about factor (k) were cured by defense counsel's comments].) Responding to the prosecutor's earlier argument that factor (k) permitted the jury to consider crime-related evidence only, defense counsel presented the following, proper interpretation of the law: "section (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence. [¶] Any jury ... that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision." The court did not permit the prosecutor to argue in rebuttal.

On this record, it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence. While the court did not embellish the language of factor (k), that fact standing alone does not support a claim of error. (See *Boyde, supra,* 494 U.S. at p. 381 [108 L.Ed.2d 329-330; *People v. Mason, supra,* 52 Cal.3d at p. 965.) Moreover, while the prosecutor's interpretation of factor (k) was clearly incorrect, any force it might have had was blunted by the court's instruction to consider "all of the evidence," the prosecutor's own discussion of defendant's mitigating evidence, and defense counsel's correct statement of the law. Accordingly, we find no instructional error.

(12) Defendant has asked us to judicially notice the transcript of oral argument before the United States Supreme Court in *Boyde, supra,* 494 U.S. 370, in which, in response to questioning, the Attorney General said that the prosecutor in

this case "misled the jurors." The dissent relies substantially on this "concession," and appears to argue that we should judicially notice the transcript. We disagree. We have examined the transcript of the oral argument in *Boyde,* and find nothing in it relevant to the proper resolution of *this* case. Even if a matter is a proper subject of judicial notice, it must still be *relevant.* (Evid. Code, § 350; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 [136 Cal.Rptr. 751].)

The meaning of the high court's opinion in *Boyde, supra,* 494 U.S. 370, must be gleaned from the opinion itself. Moreover, whatever critical remarks might have been made during oral argument in *Boyde* about the prosecutor's argument in the case before us were made without the benefit of a full examination of the record--an examination that the opinion in *Boyde* requires us to undertake before concluding that constitutional error has occurred. (*Boyde, supra,* 494 U.S. at p. 385 [108 L.Ed.2d 332].) Contrary to the implication of the dissent, we are not ignoring the officially expressed views of the Attorney General. In *this* case, he is arguing vigorously, based upon the entire record, that the jury was not misled. It is our duty to decide the issue based on the arguments and record of *this* case, not comments taken out of context in a different case. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 974-975 [4 Cal.Rptr.2d 765, 824 P.2d 571] [pretrial evaluation of a case by a supervising deputy district attorney irrelevant to our assessment of the prejudicial effect of any errors at trial].) We have performed this duty. The request to take judicial notice is therefore denied.

(f) *Other Instructional Contentions*

Defendant contends that the instructions impermissibly established a mandatory sentencing formula. The jury was instructed that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall

impose a sentence of death. [¶] However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." In *People v. Brown, supra,* 40 Cal.3d 512, we upheld the instruction, but identified two interrelated ways in which it might potentially mislead the jury. First, the jury might believe it should merely count the aggravating and mitigating factors. Second, the jury might understand the instructions as allowing or requiring it to return a death verdict without deciding that that penalty was appropriate under the facts and circumstances of the particular case. (See *People v. Hayes* (1990) 52 Cal.3d 577; 642 [276 Cal.Rptr. 874, 802 P.2d 376].) To determine whether the jury may have been misled to defendant's prejudice in these regards, we have reviewed the entire record. (*Ibid.*)

In *Boyde, supra,* 494 U.S. at pages 376-377 [108 L.Ed.2d at pages 326-327], the high court upheld these same instructions against federal constitutional attack. Assuming "our traditional *Brown* analysis" is still necessary after *Boyde* (see *People v. Gonzalez, supra,* 51 Cal.3d at p. 1231, fn. 30), we find no legitimate basis for believing the jury was misled. Indeed, the district attorney expressly argued that the jury is "supposed to go through a weighing process of the factors," and that "if the aggravating factors outweigh the mitigating, the sentence the jury *should* vote for *should* be the death penalty." (Italics added.) The jury was not misled about its sentencing function. (See *id.* at pp. 1230-1231.)

Defendant reiterates other contentions which we have previously rejected. He claims that giving the "no sympathy" instruction at the guilt phase was error since the court referred to those instructions at the penalty phase. There was no error. (*People v. Sanders* (1990) 51 Cal.3d 471, 528 [273 Cal.Rptr. 537, 797 P.2d 561].) As discussed above, the jury was not misled regarding its obligation to consider all of the defense's

mitigating evidence. (*People v. Gonzalez, supra,* 51 Cal.3d at pp. 1224-1226; *People v. Brown, supra,* 46 Cal.3d at p. 460.) Multiple use of the fact of rape (felony- murder rule, special circumstance, and aggravating circumstance) was proper. (*People v. Gates* (1987) 43 Cal.3d 1168, 1188-1190 [240 Cal.Rptr. 666, 743 P.2d 301].) The court need not clarify the section 190.3, factor (b), instruction to state that it refers to violent criminal conduct *other* than the crimes charged in this proceeding. (*People v. Sanders, supra,* 51 Cal.3d at p. 528.) Finally, the court was not required to instruct the jury that it could return a verdict of death only if it were persuaded beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and that death was the appropriate penalty. (*People v. Marshall* (1990) 50 Cal.3d 907, 935-936 [269 Cal.Rptr. 269, 790 P.2d 676].)

(g) *Propriety of the Death Penalty*

Defendant contends the 1978 death penalty law is unconstitutional. It is not. (*People v. Fierro, supra,* 1 Cal.4th at p. 255.) Defendant contends we must engage in a comparative sentence review to determine whether his sentence is disproportionate. We need not. (*People v. Cox* (1991) 53 Cal.3d 618, 690- 691 [280 Cal.Rptr. 692, 809 P.2d 351].) Given the nature of defendant's crimes, the death sentence is not so disproportionate that it shocks the conscience and offends fundamental notions of human dignity. (*Id.* at p. 690.)

II.

HABEAS CORPUS

A. *Factual Background*

Defendant filed a petition for a writ of habeas corpus, supported by various declarations, contending that his trial counsel was ineffective for not investigating and presenting evidence that he suffered from "Post-Traumatic Stress Disorder" (PTSD) because of his "combat experiences" in Vietnam.

The declaration of Dr. H.R. Kormos, a psychiatrist retained by the defense to examine defendant, recited the following factual claims by defendant. "Immediately after [defendant's] deplaning [in Vietnam], the airstrip came under fire ...." "Several times daily and sometimes also at night Mr. Payton went on helicopter missions. He flew Cobra gunships as well as HU-ID's, helicopter gunships. His unit encountered enemy activity routinely. It flew reconnaissance missions, searching for enemy locations and land mines, and backed infantry units with air strikes." Defendant's unit "often served as the point unit ..., which required a single helicopter gunship to serve as a decoy so as to literally draw, and often receive, enemy fire in an attempt to flush out the Vietcong in order that U.S. troops could identify enemy locations and respond. For many of these helicopter crews these operations amounted to suicide missions.

"During Mr. Payton's second mission, the helicopter's hydraulic system was hit by bullets and the craft crashlanded, after spinning out of control at 1200 feet altitude. Thereafter the crew was pinned down by enemy fire for three hours. With great difficulty, they were finally rescued."

Defendant "remembers witnessing avoidable deaths: a doorgunner accidentally shooting three American soldiers; a

sergeant on the flight line decapitated by a rotor blade." "After about six weeks in Vietnam, his helicopter was sent as the point ship on a night mission, with orders to try to rescue the crew of a ship downed earlier. While firing his machinegun, Mr. Payton saw enemy tracer bullets coming right at him and then he was knocked out by a round. He fully expected death, but when he came to, he discovered to his amazement that his flakjacket had stopped the bullet."

Dr. Kormos's declaration stated that "[t]his experience was extremely traumatic for" defendant. "[H]e himself was daily placed in a situation in which he was totally helpless: as a machinegunner in a helicopter, he was at the same time at the mercy of the enemy shooting at him while completely dependent on the skill and the judgment of the pilot and the co-pilot." These experiences led defendant to use drugs. Dr. Kormos believed that this "traumatization," i.e., "the sense of being out of control and of being dominated by the violence and brutality that constantly surrounded him, eventually overwhelmed him," and ultimately "shaped his behavior on the night of the homicide."

"While in Vietnam and helplessly exposed to enemy fire at the door of his helicopter, he could try to regain his mastery in only one way: by firing his machinegun and riddling any target he could hit. It was this same reflex which resulted in the rape-homicide and the attempted murders."

Dr. Kormos believed that defendant suffered from PTSD and, therefore, at the time of the crimes, "lacked substantial capacity to appreciate the wrongfulness of his conduct, and to conform his conduct to the requirements of the law. In addition, due to this mental disorder, his capacity to form specific intent to kill or commit attempted murder was diminished."

A declaration by Bob Mertz, a counselor for Vietnam veterans, contained similar descriptions of defendant's alleged combat experiences.

Based upon these and related allegations, we issued an order to show cause. In his return, the Attorney General questioned whether defendant had actually had these combat experiences. Defendant's denial to that return included another declaration by Dr. Kormos which reiterated his "opinion" that defendant "was indeed significantly involved in and exposed to combat activities during his stay in Vietnam." The declaration discussed the basis for this opinion at length, and reiterated the view that defendant suffered from PTSD.

We appointed the Honorable Robert E. Rickles, retired Justice of the Court of Appeal, Fourth Appellate District, Division Two, as our referee to take evidence and make specified findings of fact. After a lengthy evidentiary hearing, the referee issued his report.

He found that defendant's claims regarding his combat experiences were false. "The true facts were that Mr. Payton had never experienced combat and in particular had never experienced the instances described to Mr. Mertz and Dr. Kormos. Payton had arrived in Viet Nam on August 9, was in Casual company until August 25, assigned to Camp Eagle from August 25 until September 13, evacuated back on September 13 for treatment as a drug abuser, and returned to Hawaii on September 25. Payton's total exposure to Viet Nam was approximately 22 days. During this 22 days he served as a helicopter mechanic." The referee found that defendant had lied to his appellate counsel, to Mertz, and to Dr. Kormos.

In a supplemental declaration filed shortly before the evidentiary hearing, Dr. Kormos stated that he had recently interviewed defendant two more times; defendant told him that

he had not, in fact, had these combat experiences. These latest interviews, Dr. Kormos declared, "allowed me to appreciate even more than I had previously, how crucially significant his performance in the military and the question of his participation in combat in particular, had been to him. Likewise I was again impressed by the vital role his experiences in Vietnam had on him on the night he committed the crimes for which he is now facing the death penalty." Dr. Kormos concluded that the "fact that *certain details* of Mr. Payton's experiences in Vietnam are not what I initially believed them to be does not alter my opinion that Mr. Payton was suffering from this mental disorder at the time of the rape, murder and attempted murders, and, as a result of the disorder, lacked substantial capacity to appreciate the wrongfulness of his conduct, and to conform his conduct to the requirements of the law. In addition, due to his mental disorder, his capacity to form specific intent to kill or to commit attempted murder was diminished." (Italics added.)

The referee found that despite defendant's lies, evidence could have been presented that defendant suffered from PTSD, primarily the testimony of three experts retained after trial by the defense--Dr. Kormos, Dr. John P. Wilson, and Dr. Thomas Williams. The latter two believed that defendant suffered from PTSD disorder which, combined with other personality disorders, caused him to commit the crime while in a disassociative state.

The referee found that prior to trial, defense counsel "had reports from four psychiatrists[,] none of whom mentioned Payton was suffering from any psychiatric disorder." Defendant "did not mention any traumatic military experiences to any of the people who were trying to establish a possible psychological defense." Nevertheless, the referee found that trial counsel "at least should have investigated the defense of PTSD even though he might later have rejected that defense"; that counsel "should have presented evidence of PTSD at the penalty phase of the

trial"; and that if defendant had "thought about such a defense he could have and would have lied to [trial counsel] just as he did" later.

The referee found, however, that counsel would not have been "incompetent by failing to produce evidence of a post-traumatic stress disorder at the guilt trial"; the "evidence of PTSD was weak and almost totally unbelievable." Specifically, he found that "Dr. Kormos's testimony was not only illogical, it was totally without any credibility at all," and that the testimony of Drs. Wilson and Williams would also not have substantially strengthened the defense.

B. *Discussion*

(13a) Defendant contends his trial counsel rendered ineffective assistance by failing to investigate or present evidence of PTSD. **(14)** Such a contention has two components. Defendant has the burden of proving both that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694, 80 L.Ed.2d 674, 693-694, 104 S.Ct. 2052]; *In re Marquez* (1992) 1 Cal.4th 584, 602-603 [3 Cal.Rptr.2d 727, 822 P.2d 435].) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 698]; accord, *In re Marquez, supra,* 1 Cal.4th at p. 603.)

(15) The referee's findings of fact, though not binding on this court, are given great weight when supported by the record. His legal conclusions and resolutions of mixed questions of law and fact, such as whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense, are subject

to independent review. (*In re Marquez, supra,* 1 Cal.4th at p. 603.)

(13b) We disagree with the referee's finding that counsel was deficient in not investigating and presenting (at the penalty phase) the defense of PTSD. As the referee found, *none* of the four psychiatric reports indicated that defendant was suffering from that disorder. "Competent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion." (*People v. Williams* (1988) 44 Cal.3d 883, 945 [245 Cal.Rptr. 336, 751 P.2d 395]; accord *In re Fields* (1990) 51 Cal.3d 1063, 1075 [275 Cal.Rptr. 384, 800 P.2d 862] ["When three experts concur in a diagnosis, competent counsel might reasonably believe it pointless to search further in the hope of finding an expert who would offer a different diagnosis, or facts that would support such a view."].)

Furthermore, defendant did not invent his combat experiences until *after* he had been convicted, and there was no other evidence of combat experience. Despite later defense attempts to downplay the significance of actual combat (after discovery that the claims were false), such combat was the original underpinning of the alleged defense, and was what made it appear plausible. There was no evidence to alert defense counsel to a need to explore the defense. Since counsel was not required to investigate the defense, he was also not required to present the evidence.

Defendant has also not proven prejudice even if we assume counsel should have presented evidence of the kind presented at the posttrial evidentiary hearing. As the referee found, evidence of PTSD was weak and incredible. If the evidence had been presented at either the guilt or penalty phase, the jury would undoubtedly have given it little weight once it learned that the primary basis for the initial diagnosis--the vivid and

compelling descriptions of defendant's alleged combat experiences in Vietnam--was sheer invention. While Dr. Kormos may have believed, as he stated in his supplemental declaration, that the alleged combat experiences were merely "certain details of Mr. Payton's experiences in Vietnam," no reasonable jury would have so considered them. At the penalty phase, evidence that defendant had lied about his combat experiences would have severely damaged the credibility of the jailhouse redemption defense that counsel *did* present. The failure to present this defense does not undermine confidence in the guilt or penalty verdict.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied on the merits.

Lucas, C. J., and Panelli, J., Baxter, J., and George, J., concurred.

DISSENT BY: KENNARD, J.,

DISSENT:

Concurring and dissenting.

Two years ago, in oral argument before the nation's highest court in *Boyde v. California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190] (*Boyde*), the California Attorney General conceded that in the case now before us the prosecutor in his closing summation "misled the jurors" by arguing that the jury could not consider evidence, presented at the penalty phase of this capital case, that defendant had experienced a religious

awakening.[1] Now, the Attorney General argues the contrary. The majority is persuaded by his argument. I am not.

In my view, there is a reasonable likelihood that the prosecutor's closing argument, which misconstrued an ambiguous instruction by the trial court, misled the jury into believing that it could not consider any of the evidence defendant had offered at the penalty phase. When defendant objected to the improper argument, the trial court neither condemned nor corrected the prosecutor's misstatement of legal principles. As a result, the jury was erroneously permitted to infer that the prosecutor's interpretation of the law was sound. The error requires reversal of the judgment of death against defendant.

I.

At the penalty phase of this capital trial, defendant called eight witnesses. They testified that in the 17 months since his arrest defendant had become a "born again" Christian, causing him to fundamentally alter his outlook and behavior.

Deputy Sheriff Vincent Engen, who was in charge of defendant's module at the Orange County jail, testified that defendant held Bible-study sessions with the other inmates lasting from one to three hours, that he appeared to have a leadership role with the other inmates, and that his influence had been "positive." Deputy Engen was "glad" defendant was in the module "[b]ecause of his ability to calm the other inmates."

Pastor John Kirk, who had known defendant for 10 years, visited defendant at the jail approximately 7 times. He observed "a great remorse and regret in [defendant] for ... the things that

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[1]The pertinent details are discussed in footnote 2, *post.*

he had done," and believed that defendant was "sincere in his ... commitment to the Lord." Those views were shared by Barbara Seglie, the missions director for the Eagles Nest Christian Fellowship. At defendant's request, Seglie held approximately fifteen Bible- study sessions with defendant at the county jail, lasting from two to five hours. She testified that defendant's religious conversion "definitely has changed his life." When she first met defendant, his comments reflected an interest only in his own needs, but in later sessions he began to show a concern for other inmates, and eventually inmates came to defendant for counseling.

Four county jail inmates--Phillip Arellano, Dennis Howie, Keith Dandley, and Bruno Palko--testified that defendant's religious conversion was sincere. Dandley and Palko described defendant as having a "positive" and "calming" influence on the other inmates. Dandley also credited defendant with saving his life by talking him out of committing suicide.

Defendant's mother, too, testified that her son's religious awakening was genuine, and that he had become a changed man since his arrest. She visited her son regularly in jail, and described him as being "totally immersed in the Lord."

Defendant asked the trial court to instruct the jury that it could consider in mitigation "evidence of the defendant's character, background, history, mental condition and physical condition." The prosecutor objected. Although the court agreed with defendant that the jury was entitled to consider such evidence in mitigation, it refused to modify the standard instruction (former CALJIC No. 8.84.1). That instruction, echoing the requirements of Penal Code section 190.3, told the jury it should base its penalty determination on certain specified factors. The only one of those factors to which defendant's mitigating evidence could possibly apply was that described in Penal Code section 190.3, factor (k) (factor (k)): "Any other

circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

In closing argument, the prosecutor argued to the jury that the evidence presented by defendant at the penalty phase could not be considered under factor (k), because that factor "doesn't refer to anything after the fact," that is, after commission of the murder. (As the Attorney General now concedes, the prosecutor's characterization of the scope of factor (k) was incorrect.) Defense counsel asked to approach the bench, and, out of the hearing of the jury, objected that the prosecutor's argument was "completely contrary to what ... [factor] 'k' was designed to apply to." The trial court overruled the objection, deciding that defendant and the prosecutor could each argue *to the jury* their differing interpretations of the scope of factor (k). The court then told the jury that the comments of the prosecutor and defense counsel were "not evidence" and were "to be placed in [their] proper perspective."

Thus authorized by the trial court to argue his misinterpretation of factor (k), the prosecutor told the jury several times that it could not legally consider defendant's mitigating evidence: "[Y]ou have not heard during the past few days any legal evidence [in] mitigation. ... [¶] You have not heard any evidence of mitigation in this trial." Although the prosecutor also argued to the jury that even if defendant's evidence could be considered, it was of little value, he prefaced this argument by saying, "I don't really want to spend too much time on it because ... I don't think [defendant's evidence] comes under any of the eleven factors ...."

II.

Under the Eighth Amendment to the United States Constitution, a sentencing jury in a capital case must be permitted to "consider and give effect to all relevant mitigating evidence" offered by the defendant. (*Boyde, supra,* 494 U.S. at pp. 377-378 [108 L.Ed.2d at pp. 326-328]; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [90 L.Ed.2d 1, 6-7, 106 S.Ct. 1669]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L.Ed.2d 1, 8, 102 S.Ct. 869]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973. 988-993, 98 S.Ct. 2954] (plur. opn. of Burger, C.J.).) In California, the jury's consideration of mitigating evidence is limited by Penal Code section 190.3, which sets forth the aggravating and mitigating factors a jury may consider in deciding whether to return a judgment of death. In *People v. Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813] (*Easley*) and cases following it, we recognized that former CALJIC No. 8.84.1, which was given here and which describes to the jury the factors it may consider under section 190.3, is "potentially confusing." We expressed concern that a jury might construe the "factor (k)" portion of the instruction "to permit consideration only of circumstances that relate to the 'gravity *of the crime*' and not of circumstances that relate to the general character, family background or other aspects *of the defendant.*" (At p. 878.) Such a construction, we held, would violate the Eighth Amendment by impermissibly restricting the jury's consideration of mitigating evidence.

To avoid misunderstandings in future cases, our opinion in *Easley, supra,* 34 Cal.3d at page 878, footnote 10, set forth a more expansive "factor (k)" instruction. Thereafter, when reviewing "pre- *Easley*" cases in which the trial court instructed the jury in the language of former CALJIC No. 8.84.1, we have examined the entire record--including all of the jury instructions and the closing arguments of counsel--to determine whether the jury was indeed misled by the instruction. (*People v. Hamilton*

(1988) 46 Cal.3d 123, 146 [249 Cal.Rptr. 320, 756 P.2d 1348]; *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17 [230 Cal.Rptr. 834, 726 P.2d 516].)

A similar analysis was employed by the United States Supreme Court in *Boyde, supra,* 494 U.S. 370. There, as in *Easley, supra,* 34 Cal.3d 858, the defendant challenged former CALJIC No. 8.84.1, contending that it misled the jury into believing it could not consider all of the evidence presented by the defense. The high court held that to determine whether a jury was misled by an assertedly ambiguous instruction such as former CALJIC No. 8.84.1, a reviewing court must decide "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (494 U.S. at p. 380 [108 L.Ed.2d at p. 329.) Under the circumstances of that case, the *Boyde* court concluded, there was no reasonable likelihood that the jury had misapplied former CALJIC No. 8.84.1.[2]

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[2]The Attorney General's concession I mentioned at the outset of my opinion occurred during oral argument before the high court in *Boyde, supra,* 494 U.S. 370 [108 L.Ed.2d at p. 332]. According to a brief filed by the Attorney General in this case, the circumstances surrounding the concession were as follows: An amicus curiae brief filed on behalf of Boyde attempted to demonstrate the possibility that a jury could misread the scope of former CALJIC No. 8.84.1, by showing that in several cases the prosecutor had misread it. As supporting evidence, the amicus curiae brief in *Boyde* contained partial transcripts of other capital trials, including an excerpt from the prosecutor's closing argument in this particular case. After the defense attorney arguing *Boyde* before the United States Supreme Court made specific reference to that closing argument, one of the justices then asked the deputy attorney general arguing the case to respond. In the course of his

The majority relies heavily on *Boyde, supra,* 494 U.S. 370, 110 S.Ct. 1190, to conclude that the jury in this case did not misapply former CALJIC No. 8.84.1. This reliance is unfounded.

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argument, the deputy attorney general conceded that in this case the prosecutor's closing argument misled the jury.

In a footnote to its opinion in *Boyde,* the United States Supreme Court rejected amicus curiae's assertion that misinterpretation of former CALJIC No. 8.84.1 by prosecutors arguing to the jury in other cases showed that the jury in *Boyde* might have been confused. The court concluded that because prosecutors are "interested advocates," their arguments are not reflective of the likely conclusions of "reasonable jurors." (*Boyde, supra,* 494 U.S. at p. 386, fn. 6 [108 L.Ed.2d at p. 332].)

In this case, defendant has requested that we take judicial notice of the oral argument before the United States Supreme Court in *Boyde.* In his response, the Attorney General does not deny the concession in issue, but correctly points out that he is not bound by it. The majority denies the request for judicial notice, concluding that the high court's opinion in *Boyde* speaks for itself, and that the deputy attorney general's comments at oral argument before that court in *Boyde* are irrelevant to a proper resolution of this case. (Maj. opn., *ante,* p. 541 of 13 Cal.Rptr.2d, p. 1050 of 839 P.2d.) But this court has always considered the officially expressed views of the Attorney General, the state's chief law enforcement officer; and the Attorney General's opinions are frequently cited as legal authority by courts and parties alike. We should not ignore the Attorney General's views when, as in this case, they are expressed in oral argument before the nation's highest court.

One of the important factors cited by the high court in *Boyde, supra,* 494 U.S. 370, 110 S.Ct. 1190, in support of its holding that the jury in that case was not misled, was the type of evidence presented in mitigation. There, the defense presented evidence of the defendant's disadvantaged background and his strength of character in coping with a difficult childhood. The jury was instructed, in the language of former CALJIC No. 8.84.1, that it could consider " '[a]ny ... circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime,' " and was told that the term " 'extenuate' " meant " 'to lessen the seriousness of a crime as by giving an excuse.' " (*Boyde, supra,* 494 U.S. at p. 381, 110 S.Ct. at p. 1199.) Unless otherwise misled, the high court held, a jury was likely to conclude from these instructions that it could consider evidence of the defendant's disadvantaged background and his character strengths as a possible "excuse" for the seriousness of the crime. In other words, the jury was likely to reason that " ' "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" ' " (at p. 382 [108 L.Ed.2d at p. 330], italics in original, quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [106 L.Ed.2d 256, 278, 109 S.Ct. 2934.)

Here, by contrast, the mitigating evidence defendant presented was of a very different nature. Defendant relied on evidence of his behavior *after* commission of the crime, arguing in essence that *despite* the gravity of the crime he committed, he was nevertheless "worth saving." Unlike evidence of a disadvantaged background, that evidence does not fit neatly, if it fits at all, into factor (k), because it is not an "excuse" for the commission of the crime. Thus, the jurors in this case were more likely to be misled when they attempted to apply former CALJIC No. 8.84.1 than were the jurors who evaluated the "disadvantaged background" evidence presented by the defendant in *Boyde.*

More important than the type of mitigating evidence offered in this case, however, was the prosecutor's closing argument. Here, unlike *Boyde, supra,* 494 U.S. 370, *Easley, supra,* 34 Cal.3d 858, or any other case we have had before us, the prosecutor repeatedly argued to the jury that it legally could not consider any of the mitigating evidence presented by the defense. Despite defense counsel's objection, this argument was not corrected by the trial court, which ruled that the prosecutor and defense counsel could present *to the jury* their opposing interpretations of the scope of factor (k).

The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law,* not of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct. The jurors in this case were laypersons; presumably they were unfamiliar with the legislative history of factor (k) or with cases interpreting the Eighth Amendment. Thus, they were totally unequipped to decide whether the prosecutor or defense counsel had correctly explained to them which evidence they were entitled to consider in deciding whether defendant should live or die. (See *Griffin v. United States* (1991) 502 U.S. 46, [116 L.Ed.2d 371, 382-383, 112 S.Ct. 466, 474.]: "Jurors are not generally equipped to determine whether a particular theory ... submitted to them is contrary to law .... When ... jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.")

Nonetheless, the majority confidently finds no reasonable likelihood that the jury erred in discharging the impossible burden placed upon it. The reasons for the majority's conclusion do not withstand scrutiny.

The majority asserts that the prosecutor's argument was "blunted" by the trial court's remarks following defense counsel's objection. (Maj. opn., *ante,* p. 1071.) Not so. The trial court overruled that objection, permitting the prosecutor to repeat the improper argument. Although the trial court told the jury that the arguments of counsel were "not evidence," this admonition did not assist the jury in evaluating the legal soundness of the prosecutor's argument.

According to the majority, the prosecutor "implicitly conceded" that defendant's mitigating evidence was relevant, by devoting "substantial attention" to it. (Maj. opn., *ante,* p. 1071.) But the prosecutor made no such concession. True, he did discuss defendant's evidence, but he prefaced his remarks by reminding the jury that the evidence was not "applicable." In essence, the prosecution asserted that even if the evidence of defendant's Christian conversion was relevant, it did not outweigh the aggravating circumstances in this case. At no time did the prosecutor acknowledge, explicitly or implicitly, that the jury could legally consider defendant's mitigating evidence.

The majority asserts that the jury must have believed that it could consider defendant's mitigating evidence, because to conclude otherwise would transform defendant's favorable penalty phase evidence into a " ' "charade." ' " (Maj. opn., *ante,* p. 1072.) Although this argument was persuasive in *Boyde, supra,* 494 U.S. at page 383 [108 L.Ed.2d at page 331], it is far less convincing under the facts of this case. In *Boyde,* faced only with an ambiguous instruction, the jury was unlikely to believe that the instruction required it to disregard the defense's entire penalty presentation. Here, however, the jury was confronted not only with an ambiguous instruction, but with an explicit argument by the prosecutor that it should ignore the mitigating testimony offered by the defense. Any reluctance by the jury to believe that the defense had presented a "charade" may well have vanished in the face of this persuasive argument.

The majority maintains that the jurors must have considered defendant's evidence of a Christian conversion, because they were told to consider " 'all of the evidence which has been received during any part of the trial ....' " (Maj. opn., *ante,* p. 1072.) The majority, however, omits the conclusion to the instruction, which told the jury it could consider "all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed.*" (Italics added.) The jury may have believed that the instruction which immediately followed, former CALJIC No. 8.84.1, was the exception referred to by the italicized words quoted above, and that former CALJIC No. 8.84.1 limited the jury's ability to consider the evidence presented by defendant.

An additional instruction also suggested to the jury that it should disregard the mitigating evidence presented by the defense. The court instructed the jury: "After having heard all of the evidence *and after having heard and considered the argument of counsel,* you shall consider, take into account *and be guided by the applicable factors of aggravating and mitigating circumstances* upon which you have been instructed." (Italics added.) The court's statement to the jury that its consideration of "all of the evidence" should be guided by "the arguments of counsel" and "the applicable factors of aggravating and mitigating circumstances," was tantamount to an instruction to the jury that its power to consider the evidence was not unlimited. This instruction could only strengthen the prosecutor's erroneous and repeated argument to the jury that it could not legally consider defendant's mitigating evidence, and the jury may well have acted accordingly.

In the majority's view, defense counsel's closing argument accurately explained to the jury the meaning of former CALJIC No. 8.84.1. But the majority's reliance on defense counsel's closing argument is unfounded, because the trial court's instructions deprived counsel of the necessary tools with which

to defeat the prosecutor's erroneous claim that the jury should disregard defendant's mitigating evidence. Although defense counsel told the jury it was legally entitled to consider the evidence of defendant's Christian conversion, he was unable to point to any language in former CALJIC No. 8.84.1 that would support this claim. Instead, he could only suggest that although the instruction was "awkwardly worded," it nevertheless was designed to include the evidence presented by the defense. A reasonable jury would not have been persuaded by this unconvincing, unsupported assertion.

III.

As explained above, I find a "reasonable likelihood" (*Boyde, supra,* 494 U.S. at p. 380, [108 L.Ed.2d at p. 329]) that, based on the trial court's instructions and the prosecutor's misstatement of the law in his closing argument, the jury was misled into believing that it could not consider defendant's evidence in mitigation when it decided to impose the death penalty. The question then is whether the error was harmless. Because the error violated defendant's Eighth Amendment right to have the jury consider relevant mitigating evidence presented on his behalf, it was of federal constitutional dimension, and must be evaluated under the "beyond a reasonable doubt" test established in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 711-712, 87 S.Ct. 824, 24 A.L.R.3d 1965]. (*People v. Hamilton, supra,* 46 Cal.3d at p. 148.) I conclude that the error was prejudicial.

The jailhouse redemption evidence constituted defendant's entire case in mitigation. Eight witnesses testified on defendant's behalf, including a deputy sheriff at the jail who "would have had no particular reason to be favorably predisposed toward one of [his] charges ...." (*Skipper v. South Carolina, supra,* 476 U.S. at p. 8 [90 L.Ed.2d at p. 9].) This evidence, if believed, might have persuaded the jury to spare

defendant's life. Although the crimes defendant committed were heinous, they were not of such magnitude as to make a death verdict a foregone conclusion. (Compare *People v. Clark* (1992) 3 Cal.4th 41, 162-163 [10 Cal.Rptr.2d 554, 833 P.2d 561].)

In sum, I cannot say beyond a reasonable doubt that had the jury believed it could consider the mitigating evidence presented by defendant, it would nevertheless have imposed a sentence of death. Accordingly, although I would affirm the convictions and the special circumstance finding, I would reverse the judgment of death.

Mosk, J., concurred.

Appellant's petition for rehearing was denied February 10, 1993. Mosk, J., and Kennard, J., were of the opinion that the petition should be granted.

APPENDIX G

APPENDIX G

California Penal Code section 190.3

§ 190.3. Determination of death penalty or life imprisonment; evidence of aggravating and mitigating circumstances; considerations

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was

prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the

mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

(Added by § 8 of Initiative Measure approved Nov. 7, 1978.)

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ORIGINAL

Supreme Court U.S.
FILED
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No. 03-1039 (6)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

JEANNE WOODFORD,
Warden of the California State Prison at San Quentin,
Petitioner

v.

WILLIAM CHARLES PAYTON,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Rosalie L. Rakoff
A Professional Corporation
5855 Green Valley Circle, Suite 100
Culver City, California 90230
Telephone: (323) 933-5662
Facsimile: (323) 965-8677

Maria E. Stratton
Federal Public Defender
Dean R. Gits
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-7867
Facsimile: (213) 894-0081

Attorneys for Respondent William Charles Payton

By appointment of the U.S. Court of Appeals for the Ninth Circuit under the Criminal Justice Act of 1964, 18 U.S.C § 3006A(d)(6)

QUESTION PRESENTED

Does the Ninth Circuit's holding that the California Supreme Court was objectively unreasonable in denying penalty relief under the unique facts presented in this case merit certiorari review?

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I. INTRODUCTION

The state has framed the question presented in this case as whether the Circuit "violate[d] 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's 'catch-all' mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation." The problem with the state's framing of the issue, however, is that the question is *not* presented in this case. The Circuit did *not* hold that the California Supreme Court's interpretation of the state's "catch-all" mitigation instruction was wrong, unconstitutional, or objectively unreasonable. The Circuit held only that, under the unique circumstances presented by this case, the California Supreme Court was objectively unreasonable in finding that there was no reasonable likelihood that the jury believed it could not consider Payton's mitigating evidence.

Both the salient circumstances and the actual holding by the Circuit are virtually ignored by the state in its petition. The state would have this Court think that the Circuit reviewed, in the abstract, the state's "catch-all" mitigation instruction as it relates to post-offense mitigating evidence and then found the instruction unconstitutional, virtually ignoring all of the factors this Court has previously relied upon in measuring the likelihood that the jury was misled by an

ambiguous instruction. The Circuit did no such thing. It reviewed the specific facts of the case, the instructions as a whole, the rulings of the trial court and the arguments of the attorneys to the jury and found objectively unreasonable the California Supreme Court's holding that Payton's jury was not misled into believing it could not consider Payton's post-offense mitigating evidence.

There is nothing wrong or remarkable about the Circuit's opinion. The state attempts to paint it that way by omitting the salient facts and the actual holding by the Circuit. When considered in context, the Circuit's opinion is a straightforward, unremarkable and correct application of this Court's Eighth Amendment and AEDPA jurisprudence.

II. STATEMENT OF THE CASE

William Charles Payton was charged in the Superior Court of California in Orange County with capital murder, including a special circumstance of murder during the commission or attempted commission of rape of Pamela Montgomery, the attempted murder of two other persons, and the use of a knife during the commission of the crimes. The incident occurred in the early morning hours of May 26, 1980, at a boarding house in which all victims resided and in which Mr. Payton, a former resident, had been given permission to stay overnight.

No evidence was presented on Mr. Payton's behalf at the guilt phase of the

trial. Mr. Payton's entire penalty phase presentation consisted of evidence relating to his post-crime conduct, during the more than one and one-half years elapsing between his arrest and his trial. That evidence related to Mr. Payton's post-crime conversion to Christianity and his conduct following that conversion, bearing upon both his present character and the prospects of his adaptability to prison life. Eight witnesses testified to the sincerity of Mr. Payton's religious commitment, including a deputy sheriff, other prisoners, his mother, and members of the clergy. One prisoner testified that had it not been for Mr. Payton's intervention, he unquestionably would have committed suicide. Other prisoners testified as to Mr. Payton's successful efforts in organizing and assisting in bible study classes in jail, and the effect that Mr. Payton's religious commitment, as well as the example he set by living that commitment, had on their lives. This evidence was corroborated by a deputy sheriff assigned to the jail, who testified that Mr. Payton's presence and activities while in custody operated as a significant calming influence among the jailed prisoners.

During an in-chambers conference with counsel for the parties conducted immediately before the commencement of penalty argument, defense counsel orally requested that the court's instructions to the jury be modified by changing the language of factor (k) to direct the jury to consider Mr. Payton's post-arrest

conduct.[1] Even though it concluded that the case law supported the view that "almost anything can come in on behalf of the defendant, be argued," the trial court refused the requested instruction, and then authorized each side to argue its own view of whether the jury was legally permitted to consider such post-arrest evidence.

The prosecutor commenced his argument by reviewing the statutory factors that the jury could consider in deciding whether or not to sentence Mr. Payton to death. He noted that the jury is required to go through a weighing process of those factors. He observed that the penalty evidence presented by the defense did not fit within any of the factors (a) through (j), and when he got to factor (k), he told the jury:

> "K" says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact - - okay? - - some factor *at the time of the offense* that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new-born Christianity.

RT 2121-2122 (emphasis added).

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[1] Factor (k), the final or "catch-all" factor, was intended to permit the jury to consider all mitigating evidence offered by the defendant in support of a verdict of life. It provided for consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The jury instruction relating to factor (k) has since been amended, pursuant to the California Supreme Court decision in *People v. Easley*, 671 P.2d 813, 826 n.10 (Cal. 1983), to include language which encompass the modification requested by Payton's counsel.

At this point, defense counsel objected and moved at sidebar for a mistrial. The court denied the motion. Counsel then requested that the court instruct the jury that the post-crime evidence he presented on behalf of Mr. Payton does fall within the "catch-all" instruction of factor (k). The court refused counsel's request, advised both counsel that they were free to argue to the jury their own interpretation of factor (k),[2] and then instructed the jury that the comments of both the prosecution and defense are not evidence and should be placed in their "proper perspective."

With that, the prosecutor continued to state his view of whether Mr. Payton's evidence fit within factor (k):[3]

> Referring back to "K" which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.
>
> The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to lessen the gravity of the offense that the defendant has committed.
>
> [Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when--

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[2] The state's petition fails to advise this Court of (1) defense counsel's request that the trial court instruct the jury that such post-crime evidence must be considered by it in its determination of penalty; (2) the court's refusal to so instruct; and (3) the court's ruling that counsel were free to argue their own interpretation of the meaning of factor (k).

[3] The state's petition fails to advise this Court of the numerous constitutionally erroneous statements made by the prosecutor made after the trial court denied defense counsel's motion for mistrial and for an instruction that factor (k) did permit consideration of Payton's mitigating evidence.

under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense.

What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you've heard is just some jailhouse evidence to win your sympathy, that's all.

You've not heard any evidence of mitigation in this trial."

RT 2125.

.....

To vote for life without the possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and you've heard no evidence of any mitigating factors.

RT 2129.

.....

I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think its really applicable and I don't think it comes under any of the eleven factors....

RT 2129.

.....

You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did...

RT 2132-33.

Defense counsel argued that he disagreed with the prosecutor as to whether factor (k) covered Mr. Payton's post-crime conduct. He argued that such conduct

was covered, though he acknowledged that the language of factor (k) was "awkwardly worded." RT 2151.

The trial court instructed the jury as to the factors that they were to consider and be guided by in deciding whether Mr. Payton would suffer death or life without the possibility of parole. Factor (k), the only factor which both parties agreed could conceivably cover Mr. Payton's post-crime conduct, provided for consideration of "any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime."

The jury returned a verdict of death. That verdict was affirmed on appeal by the California Supreme Court, but the federal district court set aside the sentence of death in federal habeas corpus proceedings, on the ground that the prosecutor's erroneous penalty argument misled the jurors and prejudicially violated Mr. Payton's due process rights. A three judge panel of the Ninth Circuit reversed the district court, but that decision was vacated as to the penalty finding by an en banc panel of the Ninth Circuit, which held there was a reasonable likelihood, based on the facts of Mr. Payton's case, that the jury applied the factor (k) instruction in a way that prevented consideration of his mitigating evidence. This Court vacated the judgment of the en banc court and remanded the case to the Circuit for reconsideration in light of *Woodford v. Garceau*, 538 U.S. 202 (2003). On

remand, the en banc court again affirmed as to penalty, holding that the decision of the California Supreme Court, in affirming the jury's verdict of death, was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1). The state then filed its petition for writ of certiorari with this Court.

III. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. The State's Erroneous Portrayal of the Facts in *Payton* and the Findings of the En Banc Court Belie the State's Claim that Intervention by This Court is Necessary.

1. The State's "Question Presented" For Review by This Court Is Not At Issue.

The only "Question Presented" in the state's petition is:

> Did the Ninth Circuit violate 28 U.S.C. § 2254 (d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

As Payton has already pointed out, the Circuit did *not* find that the state court was unreasonable in holding that the factor (k) mitigation instruction was constitutional as applied to post-crime evidence. The predicate to such a finding would have been that the Circuit first found that factor (k) *is* constitutionally *invalid* as applied to post-crime mitigation evidence. In fact, the Circuit made no

such finding anywhere in its opinion. Instead, the Circuit observed that "[a]ny natural reading of the words of the [instruction] does not support the inclusion of post-crime evidence because mitigation evidence occurring after a crime cannot possibly 'extenuate the gravity of the crime.'" *Payton*, 346 F.3d at 1212. The Circuit's purpose for making this observation, however, was not to declare factor (k) constitutionally defective as applied to post-crime evidence, but rather to make clear why the Circuit found that "*Boyde's* conclusions about the plain wording of factor (k) and the instruction's obvious inclusion of pre-crime background evidence therefore do not apply in this case." *Id.* Indeed, throughout the opinion, the Circuit makes clear that factor (k) is – as this Court found in *Boyde v. California*, 494 U.S. 370 (1990) – ambiguous,[4] and *not*, as the state erroneously contends, facially unconstitutional as applied to post-crime evidence.

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[4] For example:
"Here, in contrast, the jury received not only an ambiguous factor (k) instruction, but also...." *Id.* at 1214.
"Here, however, the jury was confronted with an ambiguous factor (k) instruction and with post-crime mitigating evidence that, unlike the pre-crime character and background evidence in *Boyde*, did not fit clearly within the plain wording of the instruction." *Ibid.*
"Because a natural reading of the unadorned factor (k) instruction already favored the prosecutor's interpretation, defense counsel faced a prodigious hurdle in trying to convince the jury of the proper interpretation." *Id.* at 1215, n.16.

2. The State's Petition Fails to Fairly Present Facts Critical to The En Banc Court's Decision.

The erroneous presentation of the question for this Court's review is not the only mischaracterization employed by the state in its petition. Throughout its pleading, the state utterly fails to articulate and address unique facts relied upon by the en banc court in reaching its conclusion.

In addressing the erroneous argument of the prosecutor, the state's petition says only:

> The prosecutor argued, in pertinent part, that the instruction "doesn't refer to anything after the fact or later," and defense counsel unsuccessfully moved for mistrial.

Petition, at 4.

The state omits the following "explicit, deliberate, consistent, and repeated" (*Payton*, at 1213) improper prosecutorial argument articulated by the Circuit:

> 'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact . . . *at the time of the offense* that somehow operates to reduce the gravity for what the defendant did. *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.*

Id. at 1213 (emphasis, added by court, in original).

> Referring back to 'K' which I was talking about, any other

> circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with Defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. *The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.* [The defense] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that could happen when - - under any other circumstance which extenuates or lessens the gravity of the crime, refers - - seems to refer to a fact in operation *at the time of the offense.* What I am getting at, *you have not heard during the past few days any legal evidence [of] mitigation.* What you've heard is just some jailhouse evidence to win your sympathy, and that's all. *You've not heard any evidence of mitigation in this trial.*
>
> - - - -
>
> I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because *I don't think it's really applicable and I don't think it comes under any of the eleven factors ... .*

Id. (emphasis, added by court, in original).

As the Circuit made clear in its opinion, one of the critical factual differences between *Payton* and *Boyde* is that in *Boyde*, there was "'no objectionable prosecutorial argument.' Indeed, the prosecutor never suggested to the jury that it could not consider mitigating evidence of Boyde's character and background. 494 U.S. at 385. The prosecutor '*explicitly assumed* that petitioner's character evidence was a proper factor in the weighing process.'" *Payton*, 346

F.3d at 1212 (emphasis, added by court, in original).

This improper argument -- a decisive factor in the Circuit's decision and one that differentiates *Payton* from *Boyde* -- is not addressed by the state.

The state also completely fails to address the Circuit's consideration of the trial court's stunningly curious and wrong decision to let both sides argue their own personal views of the *legal significance* of factor (k), i.e., whether the jury must consider Payton's post-crime evidence in its determination of whether to impose death. The state simply represents that, "The majority concluded that because the prosecutor in Payton's trial misstated the law and Payton's mitigation evidence was post-crime, the California Supreme Court was objectively unreasonable in applying *Boyde's* principles to Payton's case." Petition at 10.

Notwithstanding the unique convergence of repeated and erroneous prosecutorial argument with an ambiguous factor (k) instruction, the Circuit noted that the trial court's laissez-faire attitude effectively added injury to insult:

> [T]he court explicitly authorized the prosecutor to argue that Payton's post-crime mitigating evidence could not be considered under factor (k), overruled defense counsel's objections to the prosecutor's legal misstatements and failed to instruct the jury that it must consider and give effect to Payton's post-crime mitigating evidence. . . . Indeed, the jury was presented with the prosecutor's and the defense attorney's conflicting arguments about whether it legally could consider Payton's mitigating evidence under factor (k), and the court left it up to the *jury* to choose which version of the law to apply.

> When the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct.

346 F.3d at 1215 (emphasis in original; footnotes omitted).

These factual alignments were critical to the Circuit's holding, yet are omitted in the state's petition.

3. The State's Petition Mischaracterizes the Findings of the En Banc Court and the Implications of Its Decision.

The state contends that "[t]he implications of the majority's decision extend far beyond the reversal of Payton's death penalty," and alleges that this decision "jeopardizes the validity of numerous death penalty cases in California in which the defendant relied, at least in part, on post-crime mitigation evidence. . . ." Petition at p. 21. This contention is utterly fallacious.

As noted above, and contrary to the State's underlying central theme here, the en banc court in *Payton* did not rule that factor (k) is constitutionally invalid when applied to post-crime evidence; it held only that, given the combination of facts presented, it was objectionably unreasonable to hold that the lay jury believed post-crime evidence was to be considered under factor (k) just like pre-crime character evidence. More importantly, the en banc court noted that,

"According to *Boyde*, 'the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.'" *Id.* at 1214. The Circuit's ruling makes it crystal clear that the decision granting penalty relief is based exclusively on the court's consideration of the unique facts present in *Payton*. Nothing articulated in *Payton* will impact other California cases dealing with the same, now-extinct, ambiguous instruction.

The state further contends that, "The Ninth Circuit's limitation of *Boyde* further jeopardizes other California death judgments because the Ninth Circuit uses it as a basis for ordering California trial courts to rewrite its jury instructions to call for pinpoint consideration of a defendant's specific category of mitigation evidence." Petition at 22. This contention is disingenuous. Placed in proper context, the Circuit said:

> Far from a fair assurance that the error was harmless, the "possible jury confusion" arising from the trial court instruction leaves us "in grave doubt about the likely effect of [the] error on the jury's verdict." [Citations omitted.] We therefore conclude that the instructional error had a "substantial and injurious effect or influence on the jury's verdict" that necessitates a new penalty phase trial. Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death.

Id. at 1218.

In the context of the opinion, nothing in that language directs that trial

courts construct a "pinpoint" instruction drawing attention to the specific post-crime mitigating evidence presented by the defendant. It merely recites that Payton is entitled to an instruction, which, unlike the ambiguous un-adorned factor (k) instruction used in his penalty trial, makes clear that such post-crime evidence must be considered by the jury in its determination of whether to impose the sentence of death. Indeed, earlier in the opinion, the Circuit notes that after Payton's death verdict, the California Supreme Court, in *People v. Easley*, 671 P.2d 813, 826 n.10 (1983), held that trial courts should inform the jury that factor (k) includes any mitigating background and character evidence that the defendant presents in mitigation, and that as a consequence, the instruction was amended to "ensure that the jury consider 'any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.'" *Id.* at 1210, n.5. In this context, it is patently clear that the Circuit recognizes that the amendment to the factor (k) instruction has obviated the problems created by the ambiguous instruction which is the subject of this litigation, and that such amendment will "properly instruct[ ] [the jury] that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death." *Id.* at 1218. In short, the Circuit did not compel trial courts to draft

instructions that direct California juries to consider post-crime mitigation evidence because the California Supreme Court – long ago – provided for such consideration.

B. The Facts of *Payton* and the Opinion of the En Banc Court Do Not Present Issues Worthy of Certiorari Review.

The *Payton* decision reflects the Circuit's considered evaluation of the particular facts and circumstances of the Payton trial in the context of this Court's mandate that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). This Court's decision in *Boyde v. California*, 494 U.S. 370 (1990), established the standard for reviewing jury instructions which are "ambiguous and therefore subject to an erroneous interpretation." *Id.* at 380. That standard established constitutional error where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* In *Boyde*, this Court further held that the determination of the effect of such ambiguous instruction on

the validity of a conviction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge," *id.* at 378, and in "the context of the proceedings." *Id.* at 383. But the "context" of the Payton proceedings were dramatically different from those in *Boyde*, and it is this factual departure that forms the basis of the Circuit's determination that the California Supreme Court was objectively unreasonable in failing to find constitutional error. The state court's evaluation of Payton's case consisted simply of adopting the factors articulated in *Boyde* as being applicable to Payton's trial, notwithstanding the dramatic factual differences between the two cases. It is because of these factual differences that the Circuit concluded that cases such as *Skipper* and *Penry v. Lynaugh*, 492 U.S. 302 (1989) – not *Boyde* – constitute the "clearly established Federal law" which governs the outcome of this case. 28 U.S.C. § 2254 (d)(2); 346 F.3d *Payton* at 1211.

As detailed in the *Payton* en banc opinion, the California Supreme Court was objectively unreasonable in failing to find constitutional error in the following critical respects:

1. The Difficulty of Subsuming Post-Crime Evidence Within the Unadorned Factor (k).

The unadorned language of the factor (k) instruction does not readily

allow consideration of post-crime evidence. That instruction, providing for consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," while allowing for *pre-crime* evidence relating to the background and character of the defendant, does not obviously allow for consideration of circumstances *after* the crime because -- as the prosecutor argued repeatedly to the jurors -- the instruction "doesn't refer to anything after the fact [of the crime] or later." As the en banc opinion made clear, this Court in *Boyde* "explicitly distinguished the character and background evidence at issue there from evidence that 'pertain[s] to prison behavior after the crime for which [the petitioner] was sentenced to death . . ." – the evidence presented in this case. 346 F.3d at 1212, citing *Boyde*, 494 U.S. at 382, n.5. Inexplicably, the majority of the California Supreme Court completely failed to even consider this distinction, even though it was prominently raised in the state court dissent. *See People v. Payton*, 3 Cal.4th 1050, 1082-1085 (Kennard, J., dissenting). This inexplicable failure of the California Supreme Court to consider the distinction between the post-crime nature of the mitigating evidence presented by Payton and the pre-crime evidence presented by Boyde constituted an unreasonable application of clearly established Federal law. *Payton*, 346 F.3d at 1211.

2. The Pervasiveness of the Prosecutor's Erroneous Argument.

While the California Supreme Court acknowledged that the prosecutor's argument was erroneous, it found such error did not result in a "reasonable likelihood" that the jury believed it could not consider such evidence. But the state court's evaluation of the impact on the jury was articulated on the basis of only *one* of the prosecutor's improper comments. The state court's determination failed to consider the cumulative impact of the prosecutor's pervasively erroneous argument,[5] even in the face of the argument of the dissenting justices that "the prosecutor told the jury several times that it could not legally consider defendant's mitigating evidence." *People v. Payton*, 3 Cal.4th at 1081 (Kennard, J., dissenting). The state court's failure to consider the extent of the prosecutor's erroneous argument was an unreasonable application of clearly established federal

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[5] The only erroneous argument evaluated by the state court was the following:

> "The factor, he told the jury, 'says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some . . . factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. [¶] It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.'" *People v. Payton*, 3 Cal.4th at 1071.

law. *Payton v. Woodford*, 346 F.3d at 1213.

Moreover, the California Supreme Court failed to consider that in *Boyde*, unlike Payton, the prosecutor did *not* engage in any erroneous argument urging the jury that they could not consider the mitigating evidence Boyde presented. The en banc court noted that "[k]ey to the Court's reasoning [in *Boyde*] was the fact that there was 'no objectionable prosecutorial argument.' Indeed, the prosecutor never suggested to the jury that it could not consider mitigating evidence of Boyde's character and background." *Id.* at 1212. That was certainly not the case in Payton's trial, but that distinction was nowhere noted in the state court evaluation.

After quoting the prosecutor's erroneous argument urging the jury that they could not legally consider Payton's mitigating evidence, the en banc court made note of the California Supreme Court's observation that, "[l]ater in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." *People v. Payton*, 3 Cal.4th at 1071. The en banc court took issue with that finding, concluding that the prosecutor's statement appears directly to contradict such finding. 346 F.3d at 1213, n.12. That same conclusion was reached by Justice Kennard in her dissent in the state court decision. She observed:

> According to the majority, the prosecutor "implicitly conceded" that the defendant's mitigating evidence was relevant, by devoting "substantial attention" to it. [Citation omitted.] But the prosecutor made no such concession. True, he did discuss defendant's evidence, but he prefaced his remarks by reminding the jury that the evidence was not "applicable." In essence, the prosecution asserted that even if the evidence of defendant's Christian conversion was relevant, it did not outweigh the aggravating circumstances in this case. At no time did the prosecutor acknowledge, explicitly or implicitly, that the jury could legally consider defendant's mitigating evidence.

People v. Payton, 3 Cal.4th at 1085 (Kennard, J., dissenting).

The en banc court noted that although the California Supreme Court recognized that the prosecutor argued a "narrow and incorrect interpretation of factor (k)," it concluded that any impact such argument might have had on the jury was "immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument' and 'to be placed in [their] proper perspective.'" *Payton*, 346 F.3d at 1213, *quoting* *People v. Payton*, 3 Cal.4th at 1071. The en banc court found this application of *Boyde* to be unreasonable, because the trial court "provided no clarifying instructions as to the proper scope of factor (k) to 'blunt' the prosecutor's legally erroneous statements." *Payton*, 346 F.3d at 1214, n.13. Moreover, the court's instruction did nothing to curtail the prosecutor's erroneous argument. In fact, right after the court's instruction, as noted above, the prosecutor took up right

where he left off before the objection, but this time with impunity.[6] Indeed, Justice Kennard's response to the majority opinion concluding that the trial court's instruction "blunted" the prosecutor's improper argument was simply:

> Not so. The trial court overruled that objection, permitting the prosecutor to repeat the improper argument. Although the trial court told the jury that the arguments of counsel were "not evidence," this admonition did not assist the jury in evaluating the legal soundness of the prosecutor's argument.

People v. Payton, 3 Cal.4th at 1084 (Kennard, J., dissenting).

The California Supreme Court also found that the prosecutor's argument was "blunted" by "defense counsel's correct statement of the law." *People v. Payton*, 3 Cal.4th at 1073. The en banc court found, however, that such conclusion was an unreasonable application of *Boyde* for two reasons. First, it was unreasonable for the state court to assume that the jury, "which received instructions that *both* attorneys' statements were merely argument and not evidence, would accord *more weight* to defense counsel's argument, containing correct statements of the law with respect to factor (k), such as to 'blunt' the effect of the prosecutor's misstatements about factor (k)." *Payton v. Woodford*, 346 F.3d at 1214, n.13 (emphasis added). Second, the Court in *Boyde* characterized the

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[6] The prosecutor resumed his argument by stating: "Referring back to 'K' which I was talking about . . . ."

statements of attorneys as ordinarily being viewed as statements of advocates, which "generally carry less weight than do instructions from the court." *Boyde*, 494 U.S. at 384. "According to *Boyde*, only instructions by the court have the force to 'blunt' attorneys' comments."[7] *Payton*, 346 F. 3d at 1214, n.13. The state court's conclusion that the defense argument "blunted" the effect of the prosecutor's constitutionally impermissible argument was, accordingly, objectively unreasonable, particularly in light of the weight this Court gave to attorney statements in *Boyde*. Moreover, "[b]ecause a natural reading of the unadorned factor (k) instruction already favored the prosecution's interpretation, defense counsel faced a prodigious hurdle in trying to convince the jury of the proper interpretation." *Id.* at 1215, n.16. As Justice Kennard noted:

> Although defense counsel told the jury it was legally entitled to consider the evidence of defendant's Christian conversion, he was unable to point to any language in [the unadorned factor (k)] that would support this claim. Instead, he could only suggest that although the instruction was "awkwardly worded," it nevertheless was designed to include the evidence presented by the defense. A reasonable jury would not have been persuaded by this unconvincing, unsupported assertion.

People v. Payton, 3 Cal.4th at 1086 (Kennard, J., dissenting).

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[7] The en banc court went on to note that in this case, however, "the trial court provided no clarifying instructions as to the proper scope of factor (k) to 'blunt' the prosecutor's legally erroneous statements." *Id.*

Finally, as noted below, in refusing to instruct the jury whether it could consider Payton's post-crime evidence under factor (k), the court effectively left it up to the jury to decide the law which would govern its judgment. Under these circumstances, "the arguments of counsel obviously take on significant importance." *Payton*, 346 F.3d at 1215.

3. The Failure of the Trial Court to Properly Instruct the Jurors.

The Circuit's determination that the California Supreme Court unreasonably applied *Boyde* in affirming Payton's conviction was grounded only in part on the fact that post-crime evidence did not easily fall within the language of factor (k), coupled with the prosecutor's unrelenting improper argument. Central to the Circuit's conclusion was a consideration of the effect of the trial court's failure to guide the jury as to whether it could consider such evidence in its determination of penalty.

Even before penalty argument commenced, out of the presence of the jury, defense counsel advised the court of his concern that the court's standard instructions, which listed the eleven factors that bound the jury in determining punishment, did not appear to cover consideration of the evidence Payton had presented during the penalty phase. Counsel requested that the court modify factor

(k) to include consideration of defendant's "character, background, history, mental condition and physical condition," as authorized by the language of California Penal Code Section 190.3. *See Payton*, 346 F.3d at 1208, and *see* Petition, Appendix G.

Although the court agreed that case law seemed to permit consideration of Payton's evidence, it refused to modify the jury instructions to include the requested language, though the court did authorize counsel to argue that such evidence should be considered. *Id.* But before defense counsel could make that argument, the prosecutor argued to the jury that factor (k) did *not* permit the jury to consider Payton's post-crime evidence. Defense counsel asked to approach the bench, and there he objected to the argument and moved for a mistrial. That motion was denied. Counsel asked the court to instruct the jury that the evidence presented by the defense during the penalty phase is covered under factor (k). The court refused to so instruct the jury, and in addition ruled that the question of whether Payton's mitigation evidence was covered under factor (k) was subject to "fair comment on either side," and that the question could be argued "either way." *Id.* at 1209.

Just before the prosecutor resumed his argument, the court instructed the jury that counsel's comments are not evidence, that the jury heard the evidence,

that "this is argument, [a]nd it's to be placed in its proper perspective." *Id.* At that, the prosecutor continued his repeated urging that Payton's evidence could not be considered by the jury because it did not fall within factor (k) (or any other factor the jury was allowed to consider). The prosecutor's argument was followed by that of the defense, which urged just the opposite, i.e., that such evidence could be considered by them. The one area of agreement by both advocates was that the jury was bound by factors (a) through (k) in its determination of whether to impose the sentence of life or death. *Id.* at 1213 (prosecutor), 1209 (defense).

The question of whether Payton's penalty phase evidence was covered under factor (k) was not a matter of "evidence" heard by the jury. It was an issue of law, for which the jury had no guidance[8] except the arguments of counsel and the context of the other instructions which the court would give the jury. As noted by the en banc court, the jury was "presented with the prosecutor's and the defense attorney's conflicting arguments about whether it legally could consider Payton's mitigating evidence under factor (k), and the court left it up to the *jury* to choose which version of the law to apply." *Payton*, 346 F. 3d at 1215 (footnote omitted,

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[8] As Justice Kennard observed in the *Payton* state court dissent, although the trial court told the jury that the arguments of counsel were not evidence, "this admonition did not assist the jury in evaluating the legal soundness of the prosecutor's argument." 3 Cal.4th at 1084 (Kennard, J., dissenting).

emphasis in original). As the en banc court noted, "A lay jury is ill-equipped to determine which view of the law is correct."[9] *Id.*

The state cannot credibly defend the actions of the trial court in leaving it up to the jury to decide whether Payton's evidence fit within the language of factor (k). As Justice Kennard observed:

> The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law*, not of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct.

People v. Payton, 3 Cal.4th at 1084. (Kennard, J., dissenting) (emphasis in original).

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[9] The en banc court also discussed the California Supreme Court's observation that mitigation testimony was presented without objection in Payton's case, and that it was unlikely that "reasonable jurors would believe the court's instructions transformed all of [defendant's] favorable testimony into a virtual charade." *Id.* at 1214, n.14, quoting *People v. Payton,* 3 Cal.4th at 1072 (quoting from *Boyde*, 494 U.S. at 383). That observation was compelling in *Boyde*, which concerned only an ambiguous factor (k) instruction. But here, the jury was not only dealing with an ambiguous instruction, but also "explicit, repeated arguments by the prosecutor that the defense had presented no mitigating evidence and that post-crime mitigating evidence does not fit within factor (k). This, coupled with the court's instruction that the jury consider the arguments of counsel, calls into doubt the court's apparent certainty that the jury did not ignore Payton's mitigating evidence." *Payton*, 346 F.3d at 1214, n.14. Moreover, presumably the jury was not schooled in either the admissibility or relevance of penalty phase evidence. Where, as here, the court expressly leaves it up to the jury to decide whether such evidence could be considered by them, why would the jury *not* believe that they were the final arbiters of what evidence is relevant and what evidence is not? Stated another way, it is unlikely that the jury could view *Payton's* mitigating evidence as a "charade" if the jury believed it was up to them to listen to such evidence and then determine whether it fell within factor (k).

Nor did the court's later penalty instructions to the jury provide any help in resolving this "impossible burden." Those instructions (set out below in n.10), although directing the jury to "consider all of the evidence which has been received during any part of the trial in this case," provided further, "*except as you may hereafter be instructed,*" and were followed by the listing of factors (a) through (k).[10] The instructions further provide that "after having heard all of the

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[10] The following comprised the entire penalty instructions given by the court. These instructions were preceded by selected guilt phase instructions which are not delineated here because they are not pertinent to any of the claims discussed herein:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
> (A), the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances fund to be true.
> (B), the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
> [C] Presence or absence of any prior felony conviction.
> [D] Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> [E] Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> [F] Whether or not the offense was committed under circumstances which defendant reasonably believed to be a moral justification or extenuation for his conduct.

(continued...)

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[10](...continued)

> (G), whether or not the defendant acted under extreme duress or under the substantial domination of another person.
> (H), whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication.
> (I), the age of the defendant at the time of the crime.
> (J), whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
> (K), any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.
>
> The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been found to be true. It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged in this case has been found to be true.
>
> Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.
>
> It is now your duty to determine which of the two penalties, death or confinement in the state prison without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.
>
> You shall now retire and select one of your numbers to act as foreman who will preside over your deliberations.

(continued...)

evidence *and after having heard and considered the argument of counsel*, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." These instructions, noted by both the en banc court, 346 F.3d at 1215, and Justice Kennard in her state court dissent, 3 Cal.4th at 1086, make clear that the jury's authority to consider "all of the evidence" was not unlimited, but rather was guided by factors (a) through (k), and the jury's consideration of these factors should be made "after having heard and considered the argument of counsel." In the words of Justice Kennard,

> This instruction could only strengthen the prosecutor's erroneous and repeated argument to the jury that it could not legally consider the defendant's mitigating evidence, and the jury may well have acted accordingly.

Payton, 3 Cal.4th at 1086, (Kennard, J., dissenting).

In stark contrast to the above, the majority of the California Supreme Court twice cited only that portion of the instructions which directed the jury to consider

---

[10](...continued)

In other words, to make a determination to the penalty, all 12 jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then shall return it to this courtroom.

Rt 2158 - 2162.

"all of the evidence"[11] without even discussing the impact of the limitation of that evidence by the listed factors (a) through (k) and the direction that the jury be guided by the arguments of counsel. The failure of the state court to evaluate factor (k) in the context of the trial court's instructions as a whole constitutes an unreasonable application of *Boyde*.

4. The Cumulative Effect of the *Payton* Facts.

Payton's unique factual scenario combined to render a "reasonable likelihood" that the jury believed they could not consider the only evidence Payton presented in mitigation of a sentence of death. These facts included: (1) the extensive, deliberate and repeated argument of the prosecutor urging the jury that it could not consider Payton's mitigating evidence in its determination of whether to impose death; (2) the trial court's abdication of its duty to instruct the jury that

---

[11] With respect to the penalty instructions relating to factor (k), the California Supreme Court said *only:*

> "The high court's observation is especially apt when the trial court, as here, has also instructed the jury to consider all of the evidence which has been received during any part of the trial in determining the penalty." 3 Cal.4th at 1072.
>
> "Moreover, while the prosecutor's interpretation of factor (k) was clearly incorrect, any force it might have had was blunted by the court's instruction to consider all of the evidence, the prosecutor's own discussion of defendant's mitigating evidence, and defense counsel's correct statement of the law." 3 Cal.4th at 1073.

it must consider such evidence; and, (3) an ambiguous instruction which does not readily admit to consideration of post-crime evidence. 346 F.3d at 1215. The facts in *Boyde* contained none of these critical factors which compel the appropriate outcome in this case. Indeed, Payton's case bears substantially greater similarity to *Penry v. Lynaugh*, 492 U.S. 302, than it does to *Boyde*. There, this Court reversed a death sentence on the basis of the prosecutor's argument and in the absence of appropriate jury instructions, finding that "a reasonable juror could well have believed there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

The en banc court found constitutional error in this case. It ruled, appropriately, that "[t]he California Supreme Court's conclusion to the contrary, on the basis of *Boyde*, which did not address improper legal argument by a prosecutor or a court's failure to provide jury instructions to correct the attorney's legally erroneous argument, was an unreasonable application of 'clearly established' Supreme Court precedent. When the effect of a mitigation instruction, viewed in the full context of the trial, is to confuse or mislead the jury in its duty to consider all relevant mitigation evidence, there has been constitutional error." *Id.* at 1216.

* * *

IV. CONCLUSION

According to this Court's decision in *Penry*, 492 U.S. at 319, "It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Under the unique combination of circumstances in this case, there is a reasonable likelihood that Payton's jury was denied that right, and the California Supreme Court was objectively unreasonable in holding otherwise. The petition for writ of certiorari should be denied.

DATED: March 24, 2004.

Respectfully submitted,
Rosalie L. Rakoff, Esq.
Maria E. Stratton
Federal Public Defender

By _____
Dean R. Gits
Deputy Federal Public Defender

Attorneys for Respondent
William Charles Payton

(2)

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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Fax: (619) 645-2191
Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1039

JEANNE WOODFORD, Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

In *Boyde v. California*, 494 U.S. 370 (1990), Boyde argued that California's "catch-all" mitigation instruction in capital cases, "factor (k)," unconstitutionally told the jury that it may consider only mitigating evidence involving the "circumstance of the crime." *Id.* at 382. This Court disagreed, holding that factor (k) "directed" the jury "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." *Id.* In the instant case, the California Supreme Court concluded that factor (k) likewise directed juries to consider post-crime evidence in mitigation (such as evidence of good behavior after a defendant's arrest). The en banc Ninth Circuit disagreed and granted habeas corpus relief to Payton.

As demonstrated in the Petition, that holding violates the mandate of 28 U.S.C. § 2254(d) that federal habeas courts must defer to reasonable state court decisions. Payton's Brief in Opposition makes only passing reference to the deference standard of § 2254(d) and utterly ignores that the Ninth Circuit found objectively unreasonable the legal conclusion of seven federal judges and five state court judges. Payton instead argues that the Ninth Circuit's decision had nothing to do with its disagreement with the California Supreme Court over the meaning and adequacy of factor (k). That contention is flatly

wrong. The entire predicate of the Ninth Circuit's decision was its conclusion that factor (k) does not encompass post-crime evidence in mitigation. In granting habeas relief based on that conclusion, the Ninth Circuit has once again shown its unwillingness to abide by the limits Congress imposed on habeas corpus review in the AEDPA. Certiorari should be granted to prevent Congress's intent from being continually thwarted.

A. The Linchpin Holding Of The Ninth Circuit's Decision In *Payton* Is That, Contrary To This Court's Holding In *Boyde*, Factor (k) Is Unconstitutional As Applied To Post-Crime Evidence In Mitigation

Contrary to Payton's assertion (Opp'n at 1), the Ninth Circuit's decision granting habeas relief does not turn on the "unique" facts of Payton's case but on the Ninth Circuit's refusal to follow *Boyde*. The Ninth Circuit insists that *Boyde*'s holding, that factor (k) is facially constitutional, is limited to cases involving pre-crime evidence in mitigation. App. A at 15-16. The Ninth Circuit then finds the California Supreme Court to have been objectively unreasonable in relying upon *Boyde*'s factor (k) holding, because, under the Ninth Circuit's interpretation, "*Boyde* does not control this case" since it involves post-crime evidence in mitigation. App. A at 15. Thus, the State has accurately identified the question presented as "Did the Ninth Circuit violate 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's 'catch-all' mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?"

In that regard, Payton's contention that the Ninth Circuit did not intend to invalidate factor (k) as applied to post-crime mitigating evidence is without merit. *See* Opp'n at 8-9. Although in this second *Payton* opinion, the en banc panel

removed its express declaration that factor (k) was constitutionally defective as applied to post-crime evidence in mitigation, it maintained virtually the identical reasoning and conclusion that factor (k) is ambiguous as applied to post-crime evidence in mitigation. *Compare* App. A at 15-17 and App. C at 58-61. The net effect of the Ninth Circuit's holding is also the same, namely, that contrary to *Boyde*, factor (k), on its face, is not constitutionally adequate under the Eighth Amendment because it does not allow for consideration of Payton's non-crime related evidence in mitigation.[1/]

As demonstrated in the State's Petition, California has it right, and the Ninth Circuit has it wrong. Under *Boyde,* factor (k) is constitutionally adequate on its face and allows for consideration of "*any other circumstance* which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde*, 494 U.S. at 382 (emphasis added). "Any other circumstance," which excludes *nothing*, therefore certainly includes post-crime evidence in mitigation.

The root of the Ninth Circuit's problem is in equating this Court's explanation for why *Boyde*'s type of evidence would naturally be considered mitigating (i.e., that people who have suffered disadvantaged circumstances might be less culpable for their actions) with the Court's actual holding in *Boyde*, which is that factor (k) permits consideration of "any other circumstance which extenuates the gravity of the crime," not just circumstances related to the crime. In doing so, the Ninth Circuit improperly limits factor (k) to evidence that might provide an *excuse for the crime* rather than evidence that might "*extenuate the gravity* of the crime." App. A at 14-16 &, n.7 (emphasis added). As set forth in the Petition, evidence demonstrating remorse or rehabilitation is equally capable of

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1. Consequently, the omission of the express declaration of the unconstitutionality of factor (k) should not be viewed as an attempt at the deference called for by AEDPA but an attempt to achieve the same result notwithstanding AEDPA.

extenuating the gravity of the crime so as to justify a sentence less than death. Pet. at 16-17. Accordingly, contrary to the Ninth Circuit's decision, factor (k) is constitutionally adequate as applied to Payton's post-crime evidence of rehabilitation.

B. The Ninth Circuit Continues To Refuse To Abide By The Dictates Of AEDPA, Which Compels Respect For The California Supreme Court's Decision In *Payton*

Notably absent in both the Ninth Circuit's decision and Payton's opposition is the deference to be afforded to the California Supreme Court's decision under AEDPA. Instead, both simply conduct a *de novo* review of the facts and substitute their own, contrary, judgment. Both justify their actions under the pretense that the California Supreme Court did not consider all of the relevant facts (such as the full extent of the prosecutor's incorrect statement of law and the trial court's curative instruction), because such facts were not sufficiently detailed by the California Supreme Court in its opinion. Ironically, the Ninth Circuit majority and Payton principally rely on the facts identified by Justice Kennard, in dissent, to illustrate their point. Justice Kennard's dissent, however, only serves to confirm the full extent the justices of the California Supreme Court thoroughly hashed out these very issues. Thus, not only is the contention that the California Supreme Court did not consider all of the relevant facts contrary to the presumption that the court considered all of the record before it regardless of whether a specific portion of the record is mentioned, the contention is belied by the decision itself in *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1992). App. F. This is precisely the kind of analysis the Court condemned in *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2003). It is precisely the type of analysis foreclosed by AEDPA.[2/]

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2. Similarly baseless is Payton's claim the State mischaracterized the record by not specifically referencing all of the facts. The State set forth the pertinent facts in its Petition. Moreover, the reasons for seeking certiorari do not turn on the particular facts of *Payton* but on the Ninth Circuit's repeated refusal to follow AEDPA and its refusal to follow *Boyde*. Payton's claims of mischaracterization of the record, therefore, are baseless. Opp'n at 10-13.

The critical point is, in analyzing and rejecting Payton's contention that his jury was foreclosed from considering his post-crime evidence in mitigation, the California Supreme Court made a decision that was neither "contrary to" nor an "unreasonable application of" clearly established Supreme Court precedent. Indeed, both Payton and the Ninth Circuit concede that the California Supreme Court identified the applicable Eighth Amendment Supreme Court jurisprudence, including *Boyde*, and methodically tracked each of the principles of *Boyde*. However, they find that the California Supreme Court was objectively unreasonable in doing so by concluding that *Boyde*'s holding and principles turn on the facts in *Boyde*. App. A at 15-23; Opp'n at 19. Such reasoning would render *Boyde* meaningless and would conflict with the decisions of this Court and a number of other courts who have applied *Boyde*'s analysis to a wide range of facts. *See, e.g., Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 271, 276-79 (1998); *Ward v. Whitley*, 21 F.3d 1355, 1365-66 (5th Cir.1994).

The decision also reflects a wholesale abandonment of the deferential standard of review required under AEDPA. Rather than giving state court decisions "the benefit of the doubt," (*Williams v. Taylor*, 529 U.S. 362, 404-13 (2000)), to "ensure that state-court convictions are given effect to the extent possible under law," (*Bell v. Cone*, 535 U.S. 685, 693 (2002)), the Ninth Circuit continues to substitute its own judgment. This is amply demonstrated by the fact that the Ninth Circuit has issued virtually identical opinions granting Payton habeas relief

based on factor (k), whether applying *de novo* review or under AEDPA.

As demonstrated in the Petition, the California Supreme Court faithfully followed and reasonably applied *Boyde*. Pet. at 5-6, 15-20. In doing so, the California Supreme Court considered the prosecutor's erroneous argument as well as the trial court's curative instruction. It simply found those facts insufficient to counter the *unambiguous* factor (k), the other instructions, the correct argument of the defense counsel, and the fact that the only evidence presented at the penalty phase was Payton's potential for being a good prisoner and his religious conversion. Thus, the California Supreme Court's decision was neither "contrary to" nor an "unreasonable application of" clearly established Supreme Court law.

Indeed, even applying *de novo* review, seven judges of the Ninth Circuit agreed with the five justices of the California Supreme Court and likewise found that there was no reasonable likelihood that Payton's jury understood the instructions so as to preclude consideration of his post-crime evidence in mitigation. App. A at 31-41. Thus, even though the Ninth Circuit majority does not agree with the California Supreme Court's decision that there was no constitutional error, "it was at least reasonable" for the California Supreme Court "to conclude otherwise." *Price v. Vincent*, 538 U.S. 634, 123 S. Ct. 1848, 1854-55 (2003). As aptly noted by Judge Tallman in dissent:

> Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it concerned pre-crime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigation evidence dichotomy offered by the majority is the majority's own untenable invention – not that of the United States Supreme Court. AEDPA commands we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to over-turn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

App. A at 41.

The Ninth Circuit's repeated refusal to follow the dictates of AEDPA undermines the careful balance that Congress struck when it enacted that law, between the state on the one hand, and the federal courts on the other. A writ of certiorari should therefore issue.

C. The Consequences Of The Ninth Circuit's Decision Ignoring AEDPA And *Boyde* Go Beyond This Case

Also contrary to Payton's assertion, Opp'n at 16-17, the Ninth Circuit's decision has consequences that extend beyond this case. As this and the State's other recent petitions for certiorari attest, the Court's supervisory intervention is urgently needed to correct the Ninth Circuit's consistently unorthodox approach to AEDPA.

Similarly, the Ninth Circuit's restrictive interpretation of *Boyde* has consequences beyond this case. The Ninth Circuit recently granted habeas relief in another death penalty case, *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003), based on the same unjustified limitation of *Boyde* to pre-crime evidence that *excuses* the crime.[3] Thus, although Belmontes's evidence of good behavior in prison *preceded* the commission of the crime for which the death penalty was being considered (i.e., was *pre-crime*), the Ninth Circuit held that factor (k) did not

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3. A petition for certiorari is to be filed *sub nom. Goughnour v. Belmontes*.

allow for consideration of that evidence because it related to Belmontes's behavior if given life in prison instead of death (i.e., *post-crime*). Under the Ninth Circuit's reasoning, such post-crime or "forward looking" evidence cannot possibly "extenuate the gravity of the crime" because it does not provide an excuse making the defendant less culpable. *Belmontes*, 350 F.3d at 900-02. As noted in the Petition, *Belmontes* is but one of many cases involving this factor (k) instruction and post-crime related evidence in mitigation. Pet. at 21. Certiorari is therefore warranted.

Additionally, the Ninth Circuit's reasoning and holding in *Payton* will be used to require pinpoint instructions concerning mitigating evidence in other cases. Payton disagrees, arguing that the now existing amended factor (k) instruction, directing the jury to consider "any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense," was effectively endorsed by the Ninth Circuit so there is no likelihood of additional instructions being required. Opp'n at 15-16. Payton misses the point. As set forth in the Petition, there are numerous death penalty cases relying upon the same version of factor (k) as used in *Payton*. Pet. at 21. Indeed, in *Belmontes*, notwithstanding a supplemental instruction to factor (k) directing Belmontes's jury to consider any evidence as a basis for a sentence less than death, the Ninth Circuit found there was a reasonable likelihood that the jury believed it could not consider Belmontes's mitigation evidence that he would be a good prisoner. *Belmontes*, 350 F.3d at 901-02. As observed by the dissent in *Belmontes*'s rehearing denial, "[t]he majority has taken a defense *argument* (good pre-trial conduct establishes hope for good future conduct) and elevated it into a *required instruction*. Nothing in the law requires or allows that." *Belmontes v. Woodford*, 359 F.3d 1079, 1087-88 (2004). Thus, the Ninth Circuit has already extended its reasoning to other capital cases. Notably, the supplemental instruction in *Belmontes* was akin to the revised factor (k) and yet the Ninth

Circuit still required an additional pinpoint instruction. Accordingly, this Court's guidance is warranted and urgently needed.

CONCLUSION

The State's Petition for Writ of Certiorari should be granted.

Dated: April 1, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

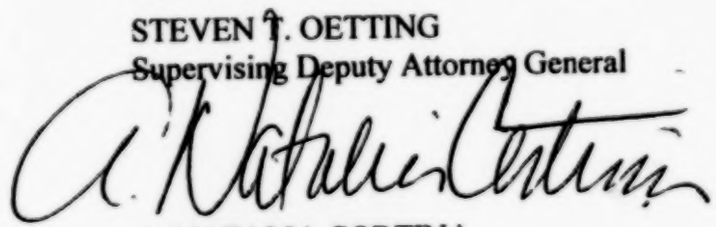
MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

WILLIAM M. WOOD
Supervising Deputy Attorney General

STEVEN T. OETTING
Supervising Deputy Attorney General



A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

ANC:nes
SD2000XF0003

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WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MARIA E. STRATTON
Federal Public Defender
DEAN R. GITS
Deputy Federal Public Defender
Counsel of Record
321 East Second Street
Los Angeles, CA 90012
Telephone: (213) 894-7867
Facsimile: (213) 894-0081

ROSALIE L. RAKOFF
A Professional Corporation
1950 Sawtelle Blvd., Suite 310
Los Angeles, CA 90025
Telephone: (323)
Facsimile: (323) 965-8677

Counsel for Respondent

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MELISSA A. MANDEL
Deputy Attorney General
A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Facsimile: (619) 645-2191

Counsel for Petitioner

Petition for Certiorari filed January 15, 2004
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CAPITAL CASE

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The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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December 17, 1999—Final Order by Judge Manuel L. Real denying in part and granting in part habeas corpus relief.

February 16, 2000—Judge Real granted an application for certificate of appealability and notice of cross-appeal.

May 10, 2001—Appeal and cross-appeal argued and submitted to Judges Pamela A. Rymer, Michael D. Hawkins and Ronald M. Gould, Circuit Judges.

August 2, 2001—Opinion filed by the Ninth Circuit (panel) reversing in part and affirming in part.

September 5, 2001—Combined Petition for Rehearing and Suggestion for Rehearing En Banc filed by William Charles Payton.

December 19, 2001—Order granting rehearing en banc.

March 20, 2002—Rehearing argued and submitted en banc to Mary M. Schroeder, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Thomas G. Nelson, A.W. Tashima, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Circuit Judges.

August 1, 2002—Opinion filed by the Ninth Circuit (en banc) reversing in part and affirming in part.

August 19, 2002—Petition for rehearing before en banc court with a suggestion for rehearing by the full court filed by Jeanne Woodford.

September 30, 2002—Order denying petition for rehearing.

December 12, 2002—Petition for Writ of Certiorari filed by Payton.

December 27, 2002—Petition for Writ of Certiorari filed by Woodford.

April 21, 2003—Payton's Petition for Writ of Certiorari denied by the United States Supreme Court.

April 21, 2003—Woodford's Petition for Writ of Certiorari granted by the United States Supreme Court with an order remanding to the Ninth Circuit for further consideration in light of *Woodford v. Garceau*, 538 U.S. 202 (2003)

June 3, 2003—Supplemental briefing filed by Payton and Woodford regarding the application of AEDPA.

October 20, 2003—Opinion filed by the Ninth Circuit (en banc) reversing in part and affirming in part.

October 30, 2003—Order granting motion to stay the mandate pending petition for writ of certiorari.

EXCERPTS FROM REPORTER'S TRANSCRIPT ON APPEAL

In the Supreme Court of the State of California

Case No. 22151

The People of the State of California

v.

William Charles Payton

[November 23, 1981, by Mr. Merwin]

[1902]

*****

Secondly, I think some of those categories are

[1903]

really designed, even if not specifically set out for the purpose of, allowing the defendant, if he wishes, to present background.

Now, if we went into something and I portrayed him as a choirboy, then I think that would be completely legitimate rebuttal, but I don't think that's open under a fair reading of the statute.

The Court: I would have to think, as I said -- I think I would have a tendency to think that more could come in, depending what the defendant opens up. I think I would have a tendency to agree somewhat with that.

I can't find any guidelines, but I would have a tendency, as I said, to feel that that area is somewhat limited. As I said, I think it's -- the more the defendant goes into it, as I said, and opens it up, I think it would be a tendency to be more of a lesser rebuttal.

As far as proceeding, I'll propose that the People put on their case and the defendant can put on their case. If the People want to put on rebuttal, the defendant can put on additional rebuttal also. That is what I am planning.

Anybody want to make opening statements or –

Mr. Jacobs: At this time I'm inclined not to make an opening statement.

The Court: I will give you a chance to, and as far as closing, I will put on the record, get into -- I intend

[1904]

to have the People open and the defendant close, just give you each one shot.

Mr. Jacobs: That's fine.

Mr. Merwin: That is fine.

Mr. Jacobs: That's what I expected.

The Court: We could go one, boom, boom, and back to you again, I mean back to let Jim have two.

Mr. Jacobs: Somewhere it says discretionary, in some cases it says preferred order is to give the defendant the last shot.

The Court: I am not going to go three and put you in the middle. I think it's better to go one and one. I don't see any need for it. That is what I am tentatively going to do.

Okay, gentlemen.

Mr. Merwin: Okay. See you tomorrow.

(Evening adjournment.)

* * * * *

[November 24, 1981]
[1927]

The Court: Yes, sir, you may.

Mr. Jacobs: Okay. I think the defense and the State at this time are willing to stipulate with regard to Mr. Payton's prior record that on April 14th, 1976, in the state of Idaho, the defendant was convicted of a felony, that being illegal possession of a controlled substance, over three ounces of marijuana.

And the People are willing to stipulate to that.

Mr. Merwin: We'll stipulate to that.

The Court: All right.

Mr. Jacobs: Okay. Second stipulation would be that then on October 8th, 1976, the defendant, Mr. Payton, was convicted of a felony in the state of Oregon, that being rape in the third degree or unlawful consensual sexual intercourse with a minor under the age of 18.

The People are willing to stipulate to those facts.

Mr. Merwin: We'd stipulate to that.

The Court: All right. Stipulation be received, gentlemen. And you may call your first witness.

Mr. Jacobs: People call Mrs. Patty Stone.

The Clerk: Raise your right hand, please.

Patricia A. Stone,

called as a witness in behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record, please.

[1928]

The Witness: Patricia A. Stone.

The Clerk: And would you spell your last name?

The Witness: S-T-O-N-E.

The Clerk: Be seated in the witness stand.

DIRECT EXAMINATION

Q By Mr. Jacobs: Mrs. Stone, is your maiden name Balun, that being B-A-L-U-N?

A Balun.

Q Balun. In 1973, was that your name?

A Yes, it was.

Q Okay. Miss Stone, do you know the defendant in this case, Mr. Payton?

A Yes, I do.

Q And were you acquainted with him back in September of 1973?

A Yes, I was.

Q Okay. Directing your attention to the date of the evening, Saturday evening, September 15th, 1973, did you meet with him somewhere in Orange County?

A Yes, I met him at a party.

Q Okay. And after you met him at a party, did you go somewhere with him?

A Yes, a friend and I took him with us. His car wouldn't start.

Q And where did you go?

A We went to a liquor store first, and then we

[1929]

went to my apartment.

Q Okay. Sometime later -- was your apartment in the city of Anaheim?

A Yes, it was.

Q Okay. Sometime later that evening, did you have occasion to be alone with Mr. Payton?

A Yes, my -- my friend didn't come up to the apartment. She left.

Q Okay. And sometime later after that, did you and Mr. Payton go to bed together?

A Yes, we did.

Q Did you have sexual relations with him?

A Uh-huh. Yes.

Q Okay. After that, did you fall asleep?

A Yes, I did.

Q Okay. Did you awake -- did you awake sometime after that?

A Yes. I woke up and had a knife at my neck.

Q Okay. And did you see who was holding the knife?

A Yes, I did.

Q Who was that?

A Mr. Payton.

Q And what happened after you awoke and saw the knife?

A I wasn't quite awake yet, and I -- I don't know, I just kind of said, you know, "'knock it off," and --

[1930]

and then the next thing I knew I was being stabbed.

Q Okay. Do you know what kind of a knife you were being stabbed with?

A It was a -- it was one of my kitchen knives.

Q Where were you stabbed?

A I was stabbed in my upper right arm and my right chest.

Q In your chest. The stab wound to your chest, do you know, was it just a light stab wound or was it a deep stab wound?

A No. It was a deep wound.

Q And how many times total, do you know, you were stabbed?

A I'd probably say three or four in my arm and probably a couple times in my chest and --

Q Did it leave -- did the stab wounds leave scars?

A Yes.

Q Do you still have them today?

A Uh-huh.

Q At some point did he eventually stop stabbing you?

A Yes. I finally got him off of me and I went in to the front room and called the police.

Q Were you bleeding?

A Yes, I was.

Q Did Mr. Payton stay in the apartment?

[1931]

A Yes, he did.

Q Did you essentially end up laying down on the floor?

A Uh-huh, until the police came.
Q When the police arrived did they give you first aid?
A Yeah.
Q The paramedics arrived shortly afterwards?
A Uh-huh.
Q Was -- Mr. Payton stayed in the apartment?
A Yes, he did.
Q Was he arrested?
A Uh-huh.
Q And were you taken to the hospital?
A Yes, I was.
Q And how many days did you stay in the hospital?
A I was -- about two and a half.
Q At any time that evening prior to your waking up and seeing the knife at your neck, had you had any type of argument with Mr. Payton of any type?
A No, I didn't.
Mr. Jacobs: Okay. Thank you. I have no further questions.
The Court: You may inquire, Mr. Merwin.

CROSS EXAMINATION

Q By Mr. Merwin: Mrs. Stone, I gather this came

[1932]

out of the blue as far as you were concerned?
A Yes.
Q Had you and Mr. Payton dated before that evening?
A Yeah, about a year and a half before we had gone out.
Q Had you lived together for awhile?
A Yes, we did.
Q So this wasn't the first time you had intercourse?
A No.
Q What was the general theme of the conversation that evening before you went to bed?

A We were talking about just old times, the group of people we used to run with, and that was all.
Q So it was light or pleasant?
A Uh-huh.
Q Did Mr. Payton assist in the first aid?
A Yeah. He put a towel around my arm.
Q After he was arrested did you go to visit him at the jail?
A Yes.
Mr. Merwin: Thank you. I have nothing further -- one last question.
Q By Mr. Merwin: Had you taken any drugs that evening?
A No, I hadn't.
Q To your knowledge had Mr. Payton?

[1933]

A I wasn't -- I don't know. I didn't see him do any.
Mr. Merwin: Thank you. I have nothing further.
The Court: Mr. Jacobs.

REDIRECT EXAMINATION

Q By Mr. Jacobs: Prior to going to sleep with Mr. Payton, did he seem cognizant, in other words, aware of what he was doing?
A Yes, he did.
Q He didn't have any problems conversing?
A No.
Q He seemed intelligible; is that correct?
A Uh-huh.
Mr. Jacobs: I have nothing further.
The Court: Mr. Merwin.

RECROSS EXAMINATION

Q By Mr. Merwin: Did he make any statement to you

indicating what he thought was happening at the time of the stabbing?

A Like why?

Q Yes.

A No.

Mr. Merwin: Nothing further.

Mr. Jacobs: Nothing further.

The Court: Thank you, ma'am. You're excused. Call your next witness.

[1934]

Mr. Jacobs: People call Danny Escalera.

Daniel Larry Escalera,

called as a witness in behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Daniel Larry Escalera.

The Clerk: Spell the last name.

The Witness: E-S-C-A-L-E-R-A.

The Clerk: Be seated in the witness stand, please.

Mr. Merwin: Your Honor, before any testimony is taken from the witness, may we have a brief conversation at the bench with the reporter?

The Court: Certainly.

(The following proceedings had at the bench between Court and counsel out of the hearing of the jury:)

Mr. Merwin: I'd like to renew my objection to the introduction of any evidence from this witness regarding what amounts to his stated intent to commit future crimes regarding potential future victims, regarding any women regardless of age or appearance.

I think what we're doing is allowing through the back door evidence that cannot be properly brought in through the front door, namely, as character evidence or as evidence of intent to commit future crimes.

The Court: Mr. Jacobs.

Mr. Jacobs: Well, the way I phrase the question is

[1935]

his problem, everything I'm talking about is his problem as far as at the time when he committed the offense and that the way he views people and that's not -- if his attitude at the time of the offense is the type of testimony I'm eliciting, which is what I'm doing, then it's not -- for one thing, I think character evidence, this is his state of mind that I am trying to get into that shows the reason why the crime took place and that's the way I phrase the question.

Mr. Merwin: Excuse me. The reason I think that it's particularly offensive is that there is no other way to interpret it other than he is or he has the same attitude and he's projecting forward and everyone in this room and every woman on the street is a potential victim, and I think that's evidence of an intent to commit future crimes.

The Court: I think on your cross examination you indicated he still had that intent and so forth. I'll overrule the objection.

(The following proceedings had in open court in the presence of the jury:)

DIRECT EXAMINATION

Q By Mr. Jacobs: Mr. Escalera, you know the defendant in this case, Mr. Payton?

A Yes, I do.

Q Okay. And did you have occasion to be in custody over at the Orange County jail during the early part of

[1936]

this year, 1981?

A Yes, I was.

Q And were you -- while you were in custody, were you in the same module with the defendant, Mr. Payton?

A Yes, I was.

Q While you were in custody -- by the -- did you have any conversations with him about the case he was in custody on?

A Yes.

Q Okay. During what month was that?

A March.

Q Did you have a number of conversations?

A Yes, I did.

Q Okay. In those conversations, did he ever tell you the name of the woman's house where the alleged crimes had taken place?

A Yes, he did.

Q What was her -- what name did he give you?

A Patty.

Q Okay. And did he relate to you the facts of the crimes or what he did inside the house?

A Yes, he did.

Q Okay. And as part of those conversations with him, did he ever give you a reason for committing the acts that he told you about?

A He had a severe problem with sex and women.

[1937]

Q Okay. And did he tell you what that problem was?

A Stab them and rape them.

Q Pardon?

A Stab them and rape them.

Q Okay. When he told you that, did he tell you whether this applied to some women, all women, or what did he say?

A He said that all women on the street that he seen was [sic] a potential victim, regardless of age or looks.

Q Okay. Mr. Escalera, you've been previously convicted of felonies, is that correct?

A Yes, I have.

Q 1969, you were convicted of a felony, possession of forged checks, is that correct?

A Yes.

Q And 1976, you were convicted of attempted robbery, is that correct?

A Yes.

Q And let me see. You also have a pending robbery which you've pled guilty to, is that correct?

A Yes, I have.

Q Okay. That pending robbery, is that still pending as far as sentencing?

A I've pled guilty, and sentencing is pending.

Q Okay. Have -- as far as any promises to your sentence, what is your understanding about what your sentence

[1938]

could be?

A Okay. No -- no actual promise has been made to me. I pled to one to seven years. I'm hoping that it's brought to the sentencing judge what I'm about to do.

Q Okay. Nobody on the form -- as far as you're concerned, you could get one to seven, is that correct?

A Yes, sir.

Mr. Jacobs: Thank you. I have no further questions.

The Court: Mr. Merwin, you may inquire.

Mr. Merwin: Thank you.

CROSS EXAMINATION

Q By Mr. Merwin: Mr. Escalera, have you been convicted of any other felonies other than the ones you've mentioned?

A 211 twice and --

Mr. Jacobs: (Indicating.) This is the --
The Witness: -- forgery.
Q By Mr. Merwin: That's robbery, 211?
A Yes.
Q Is this current one that you pled guilty to, did that involve use of a knife?
A Yes, it did.
Q By you?
A Yes.
Q Held to the neck of a victim?
A Yes.
Q And you understand that the range of your sentence

[1939]

is somewhere between one and seven years?
A That's correct.
Q And you expect what you're doing here to inure or result in some sort of advantage to you even though there's no specific promise that that will happen?
A That's correct.
Q You've discussed this case and what you're doing with this case with your lawyer in your case?
A Yes.
Q And he's informed you he'll bring this testimony to the attention of the court that sentences you?
A Yes, he will.
Q And you're hoping for the one year?
A That's what I'm hoping for.
Mr. Merwin: Thank you. Nothing further.
Mr. Jacobs: Nothing further.
The Court: Thank you, sir. You're excused. You may call your next witness.
Mr. Jacobs: People rest.
The Court: You're resting at this time then?
Mr. Jacobs: Yes, your Honor.

The Court: Ladies and gentlemen, the reason I'm smiling, I hate to tell you we're going to take a break right now, but the People have rested their particular case at this time.
I do want to indicate to you in this particular

* * * * *

[1944]

Santa Ana, California - Wednesday, November 25, 1981
Morning Session

(The following proceedings had in open court in the presence of the jury:)
The Court: Usual stipulation, gentlemen?
Mr. Jacobs: Yes.
Mr. Merwin: Yes, your Honor.
The Court: Mr. Merwin, do you desire to make an opening statement?
Mr. Merwin: No, your Honor.
The Court: All right. You may call your first witness.
Mr. Merwin: Pastor John Kirk.

John 0. Kirk,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:
The Clerk: State your full name for the record, sir.
The Witness: John 0. Kirk.
The Clerk: Spell the last name.
The Witness: K- I- R- K.
The Clerk: Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: What is your profession, sir?
A I'm a pastor or minister.
Q And what church?

A Trinity Community, Four Square Church in Buena Park, California.

[1945]

Q How long have you been in the ministry?
A Since 1935.
Q So that's 46 years?
A Something like that.
Q How long have you been at this church that you just mentioned in Buena Park?
A Over 20 years.
Q You recognize Bill Payton?
A Yes, I do.
Q When did you first meet Mr. Payton?
A Bill became one of the high school young people of our church about ten years ago, ten, 11 years ago.
Q This is the Trinity Community Church in Buena Park?
A Right.
Q Did he come with parents or did he come alone?
A Came -- came alone.
Q How long was he involved in your church group?
A I'd say couple years.
Q Did you --
A Possibly one or two years.
Q Did you form any impressions during that period of his life, 16 to 18 roughly --
A Yes.
Q This period you're talking about? Regarding any of his abilities?

[1946]

A Yes, I -- I -- I felt and appraised Bill as a very bright, articulate young man with charisma and with outstanding potential.

Q Did you feel that he was committed to serving the Lord at that point in his life?
A No. I never did. I felt that he was uncommitted.
Q After this two-year period that you've discussed, did you then follow Bill's progress?
A No, Bill drifted out of the picture.
Q Do you know when he left the church what happened to him of your own knowledge?
A No, I do not.
Q When was the next time you contacted Bill Payton?
A In the Orange County jail.
Q How did you learn that he was in the Orange County jail?
A A fellow pastor. He had written a fellow pastor, and the pastor knowing that we had had contact with him in his early years contacted me. This pastor telephoned me, and I went to see Bill.
Q How many different times --? Well, roughly when was that first contact at the Orange County jail?
A I would say shortly after he was incarcerated, brought back from Florida, maybe a month? Something of that type after he was in jail in 1980.
Q How many times have you seen him at the jail

[1947]

since that occasion?
A I would estimate six, eight times.
(Continued on page 1948; nothing omitted.)

[1948]

Q How long did these interviews last, or these conversations?
A Maybe an average of 45 minutes face to face, either in a conference room or at the bench there where we had personal face to face conversation.

Q During these conversations did you discuss religion?

A Oh, yes.

Q Have you an opinion now whether or not Bill is committed to serving the Lord?

A Could I first say something? I felt deeply disappointed in Bill when he was in our church, I felt that --

Q Why is that?

A I felt that Bill had not really lived up to the potential that he could have lived up to with the commitment to the Lord.

Of course, when I came to the county jail and we began to talk about religion, I sensed a great remorse and regret in Bill for the life that he had -- the things that he had done.

Q Did you form an opinion based on your interviews with Bill at the jail as to whether or not there's some change in his life regarding religion?

A Yes, I did. I think one of the first things I said to Bill, well, Bill, let's not have a snow job. We can't give God a snow job. You can't give yourself a snow

[1949]

job. Let's not give me a snow job.

I have felt that Bill had made a commitment of his life to the Lord Jesus according to the New Testament and Bible principles.

Q Since you brought up the subject of snow job, initially, I infer that's always a question in your mind whether someone is being sincere or insincere with you when he or she talks about a commitment to religion?

A I think that's certainly true. After all, we have to prove our walk.

Q Did you form an opinion whether or not Bill was sincere about what he was telling you about his change in life regarding religion?

A I sincerely believe that Bill has made a commitment and that he is sincere in his statement and commitment to the Lord.

That is my own personal opinion. We can never be a hundred percent sure of anything of another person.

In fact, I wonder sometimes if we can be a hundred percent certain about ourselves.

Mr. Merwin: Thank you. I have nothing further.

Mr. Jacobs: No questions.

The Court: Thank you, sir. You are excused.

You may call your next witness.

Mr. Merwin: Barbara Seglie.

Barbara Seglie,

called as a witness in behalf of the defendant, having been

[1950]

first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record, please.

The Witness: Barbara Seglie.

The Clerk: Would you please spell your first and last name?

The Witness: B-A-R-B-A-R-A S-E-G-L-I-E.

The Clerk: Thank you. Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: Barbara, you've attended the trial in this matter?

A Yes.

Q When did you first meet Bill Payton?

A In May of 1981.

Q At that time were you involved in a local church here in Santa Ana?

A Yes. I am on a voluntary staff as Missions Director for the Eagles Nest Christian Fellowship.

(Continued on page 1951; nothing omitted.)

[1951]

Q Where is that located?
A In Santa Ana on Edinger.
Q How many members or constituents are there?
A There are 3,000 or more.
Q How long has that church been in existence, to your knowledge?
A The last three years.
Q What are your responsibilities as Missions Director and counselor at that church?
A Well, I'm responsible for administrating about seven outreaches there at the church which consists of the prison ministry, the orphanage, the missionary outreach, convalescent homes, witnessing and things of this type as far -- and also storage of food and clothing which we distribute to the poor.
Q How did you first come in contact with Mr. Payton?
A Mr. Payton had called me because he received a publication from the church, I think from another inmate's wife, who attended our church. And so he called the church in the hopes of getting some counseling and some Christian fellowship and instruction as to the Bible.
Q When did this first contact with the church from Mr. Payton occur?
A In May.
Q In May of this last year?
A Of '81, yes.

[1952]

Q Did you go to see him at the jail?
A Yes, I did.
Q How many times have you seen Mr. Payton at the jail?
A I would say about 15 times. I don't have an exact number on it.
Q Now, where do you talk to him at the jail?

A I go to the attorney bonds section where you can either have a closed-in booth and talk privately or it's over a -- a counter-type situation.
Q When you go, do you go by yourself or do you go with someone else?
A I have gone by myself and I like to bring a male counselor with me so that he would have some kind of contact with a man of his age who is serving the Lord on the outside so he would have an example.
Q How long do these interviews or conversations with Mr. Payton normally last?
A Well, we generally have a freedom. So they could go anywhere from two to five hours, and they have generally gone that long.
Q What topics are discussed during these conversations?
A Well, generally Mr. Payton has a number of questions pertaining to scripture, Bible studies and things of this type that would enable him to serve the Lord in a greater

[1953]

capacity as far as prayer and worship and counseling and instructing others within the prison.
Q During these conversations or interviews, does he become involved or is he sitting there listening to you talk?
A It's a two-way conversation.
Q Is there any question-and-answer aspect of these conversations?
A Oh, yes, generally. It's a -- a normal conversation, instruct -- in answer to his questions, and we ask questions as well.
Q What types of questions does Mr. Payton present?
A Well, he has questions as to the Holy Spirit and learning about the spirit of God, how to pray, how to worship God, what -- what would be necessary to take a life, like such as his own, and consecrate it to God's work and what kind of manner of person he would have to be to serve the Lord.

Q You familiar with a correspondence Bible college, Rhema Bible College in Oklahoma?

A Yes, it's one of the most reknowned [sic] Bible colleges in the United States. And Mr. Payton was accepted by that university in correspondence course, and which I believe he has just started.

Q Now, you said that's reknowned [sic]. Is that well regarded --

[1954]

Or --

A Yes, yes. It's a very well regarded university in the United States. In Tulsa, Oklahoma.

Q What makes you believe he's been accepted?

A Well, I've -- I've received the letter and his lessons which have been given to him. So I saw the letter from Kenneth Hagen accepting him and stating that if he did not have the funds to pay for the -- the course, that it was okay. If any funds would come in, they would accept it, but there would be no charge otherwise.

Q Has Mr. Payton told you anything about a change in his life relative to religion or faith?

A Oh, definitely. I'd say that that's been the primary motivating force within his life now that he's been incarcerated. And that's -- definitely has changed his life.

Q In what way?

A Well, as opposed to being a self-centered person, he has now become a selfless person in that he seeks to serve God. He's consecrated his life to God in that he's not only accepted a statement of the faith but he is taking that faith and applying it in action by witnessing and establishing Bible studies and quite an extensive outreach as far as Bible tracks and literature for the other inmates.

Q Let me back up a moment.

A Uh-huh.

Q Now, we're all, I'm sure, aware that he could

[1955]

be telling you that there's been a change in his life.

A Uh-huh.

Q Regarding his faith. And it could be false. I mean, that's possible.

A Uh-huh.

Q Do you think he's sincere?

A Yes.

Q Why do you think he's sincere?

A The quality of his questions are in depth. His knowledge of the scriptures is extensive.

(Continued on page 1956; nothing omitted.)

[1956]

He has a good knowledge over the last year to not only memorize the Scriptures but apply them in certain problem situations, and that's taking his faith and applying it.

Q You mentioned that he's setting up Bible classes?

A Uh-huh, within the -- within the different tiers at the jail here.

He has Bible studies, I don't know what nights, I think perhaps Monday night he said recently -- he just had a very successful Bible study on Monday night and he has sometimes 15 other inmates there.

I have on several occasions met with him and a couple of the other inmates that he has led to Christ in the hopes of instructing all them together.

So I've always seen him with other inmates in regard to his Christian walk at this point.

Q Where does this joint conversation or interview occur?

A In the attorney bonds section of the jail.

Q So you would be present with Mr. Payton and other inmates?

A Other inmates and usually another counselor.

Q So you've had a chance to observe his interaction with these others?

A Yes.

Q What sort of conversation or what sort of statements

[1957]

was Bill making during these joint interviews?

A Well, he might assist the -- one of the other inmates if they were having a particular question to -- if the next gentleman had a question on -- in his studies, maybe he wasn't quite as literate as Mr. Payton, so he would kind of enhance him so that I would understand what problem he was having with the -- with his walk, with his studies.

Q You said one of the things he's doing is witnessing. What do you mean by that?

A Witnessing is declaring your faith and your faith in Jesus Christ and how that faith has changed your life from an old life, an old dead spiritual life to a new one in the hope of what we attain to, which is to spend eternity with God.

Q What makes you believe he's witnessing in that sense?

A I have quite a few letters which he witnesses to other people in other jails. He's corresponding to them and plus the fact that I have names of other inmates that he has led to the Lord and I've also been with him with these other inmates.

Q So you have letters from Mr. Payton to other inmates?

A No. From the responses.

Q And where are these other inmates located?

A In various jails, prisons around the area.

[1958]

Q Since your first contact with Mr. Payton here in the Orange County jail, have you seen any changes in him?

A Yes, I definitely have.

Q What changes?

A I find that he's definitely matured and mellowed, if that would be a common word. He's been -- become more serious and more self-disciplined.

Q How do you mean self-disciplined?

A Well, in his course of studies, he not only studies the Bible but I believe he completed some calculus courses. He's set up a program of exercise. He has written extensively and has completed, just about completed an autobiography which has an excellent chance of being published in an international -- published from an international Christian publishing house.

Q What makes you think that?

A Because I've been in contact with that publishing company and they may, in fact, want to come down to the jail and interview him before he is sent wherever he is sent.

Q Is there any other ways in which you've seen changes in Mr. Payton?

A In the -- not only in the questions initially when I first met him where it would be -- he was interested in his own personal interest, and how he could become a better Christian, but now his questions not only incorporate his own, but in others. He wants to make sure the other inmates

[1959]

have their questions answered as well.

He's set about goals, you know, he's kind of taken his mind off the problem situation of the trial and applied it to what he can be as a Christian and developing a ministry within the prison system that would totally rehabilitate prisoners, not as it has been in the past by the state rehabilitation systems.

Q When he tells you that is his goal he's set for himself, do you think he's sincere?

A Yes.

Q How would you describe his relationship with the other inmates insofar as you are aware of?

A It seems to me that he gets along fairly amiably with a good portion of them. He seems to be a leader in the sense that from what I understand, the number of gentlemen come up to him and situations where they are having problems with sins or maybe their wives have left them in the course of while they are staying in prison, and they generally come to Bill for counseling. And that puts him in a leadership or a teaching position, and I would say that would mean a good portion of the inmates respect him and trust him and have a confidence in him.

Q Now, we've talked about some face-to-face conversations you've had with him. Have you had any correspondence with him?

A Uh-huh. Yes, I have.

[1960]

Q Does he write to you?

A Yes, he does. He writes letters.

Q Do you have any of the letters he's written that reflect his style of writing or his ability of writing?

A Yes. I have a couple of excerpts from his autobiography and I also have his personal journal which he entrusted to me because I guess there was some kind of situation in the jail where his writings were being discarded by some of the guards and he wanted to make sure they were preserved and in a safe place.

Q Do you have some samples of this writing with you?

A Yes, I do.

Mr. Merwin: If the Court has no objection, I'd like to have these read, and I am offering them for the style they reflect.

The Court: They will be received.

The Witness: Should I read some?

Q By Mr. Merwin: Yes.

A This is written in his own hand. I take it they're not allowed to use pen, so it's all written in pencil and I don't believe he knew that I would -- somebody would have these, but I do have them now.

This is a little section of when he arrived in his platoon in Vietnam, when he first arrived.

(Continued on page 1961; nothing omitted.)

[1961]

"As my platoon stood helplessly lost beside a C-140 transporter, I couldn't help thinking how ridiculous, lamely, even naively we must have looked. We all definitely were new meat to Vietnam, and everyone who looked upon us knew it. There's something about having every item on your person being new that makes you ill. New fatigues, packs, weapons, even new shorts. For the present time, we were cherries and would remain so until the struggles of monsoons had seasoned us and the smell of battle had matured our thinking. Ugly but so very accurate.

"Scanning the ocean, it was impossible not to notice the constant pressure of tension, the possibility of anything possible happening. To look into the eyes of one who had spent much time in this rain soaked, humid land of 30 years of war was a scare -- was a story in itself.

"If you were 20, your chances of appearing 30 --30 years old upon departure were about the norm. They all looked tired. They all looked ready to go home. So they were. For this was the reception center. Cam Ranh Bay, Vietnam. Those leaving and those who arrived came here."

Here's another section. I believe this took place when he had fled to Florida. And he -- he -- this is just something -- this is all written, of course, after the fact.

"As I sat pushing my feet deep into the sun warmed sand, I allowed my eyes to wander and extend their sight to as far across the water as possible. So this is it. The

[1962]

Atlantic Ocean. While the gleaming reflections caused my eyelids to lower as much as possible, I didn't want to stop my stare.

"There was a moment's peace for the first time in weeks, wondering how God must have felt upon his creating this beautiful body of water. I -- my thoughts came to a halt at the view of a large school of whale -- seals barking their way through the ocean current, how my sole instantly yearned to be with them. Bounding our way south, twisting and weaving with precise precision. Life for them was nothing but fun while fish hunting."

And that's -- those are two excerpts from his autobiography.

Q If the jury returns a verdict of life without possibility of parole, do you think there's any valuable contribution Bill Payton can make within a prison system?

A Most definitely.

Q What?

A Most prison ministries or -- or therapy situations only take place between the therapist and the patient or the minister and -- and the prisoner. And once that situation
is ended, one-on-one situation, the minister would leave.

But if -- if he were allowed to develop this ministry, it would be valuable -- invaluable as far as he is in the system. He would be in the environment. And he would be a 24-hour-a-day availability to counsel with men.

[1963]

And plus, men learn by examples. And if he could be an

example to others, the strength of faith and dedication of his talent in the development of God given abilities, to win people to Christ, to change their lives, I think it would be invaluable. It would be something that had -- wouldn't -- has never been done in the -- in the penal system as far as rehabilitation, total rehabilitation of a criminal.

Q Do you intend to continue to assist Mr. Payton in his ministry in the prison?

A Yes, I do.

Mr. Merwin: Thank you. I have nothing further.

The Court: Any questions?

Mr. Jacobs: Just a few.

CROSS EXAMINATION

Q By Mr. Jacobs: When was the last time you met with Mr. Payton and discussed religion prior to today?

A It was Monday night, I think.

Q Yesterday?

A Wait a minute. Not yesterday. Sunday night, yeah.

Q Sunday night?

A Yeah.

Q When was the last time you met with the defendant and other inmates to discuss religion?

A I think it was in July.

Q Okay. So since July, you haven't met with the

[1964]

defendant and any other inmates in these, like, group sessions, is that correct?

A I don't think so, no.

Q Okay. Now, you talked to Mr. Payton then Monday, and that was after the verdict had come in on this case, is that correct?

A Uh-huh.

Q At that time, did Mr. Payton express to you whether or not he could -- he had planned on continuing these religious plans of his?

A Definitely.

Q What did he say? Did he say he was going to keep doing it?

A As a matter of fact, he didn't dwell on the verdict. He -- we focused in on the future of the work to make sure before he left everything would be taken care of.

Q Did he talk to you about testifying?

A He didn't know whether he was testifying or not.

Q No, whether you would testify.

A It was always a possibility, but I didn't know really until -- until Sunday night that I would be testifying.

Q Mr. Payton ever talk to you about testifying?

A He asked me if he thought -- if I was sure I would want to testify.

Q When was the subject first broached between the two of you?

[1965]

A That --

Q If you can --

A I can't really recall that.

Q Can you say whether it was months ago or yesterday or -- do you know what I mean?

A I think it was more recently.

Q Within a month or so, would that sound right?

A As a possibility of testifying, yes.

Q Now, you -- I think you testified that your opinion at this present time, you think that the defendant is basically a self -- a selfless religious person, is that what you think?

A I don't like to use the term religion because that puts one in the norm. It's a -- a statement of faith and living of faith, and I would say yes.

Q Let's just say selfless then. Okay?

A Yes.

Q Do you think he's self -- do you think if he was on the streets today, he'd be selfless?

A Uh-huh.

Q You think so?

A Yes.

Q Or do you think he's selfless because he's facing the death penalty?

A No, I think in the situation of a death penalty, many men revert to their own self-pity.

[1966]

Q You think he ever would have contacted you if he wasn't facing the death penalty?

Mr. Merwin: Objection, speculation.

The Court: Sustained.

Mr. Jacobs: I have nothing further.

The Court: Anything further?

Mr. Jacobs: No.

Mr. Merwin: No, your Honor.

The Court: May she be excused?

Mr. Merwin: Yes.

The Court: Thank you. You are excused.

The Witness: Thank you.

Mr. Merwin: The other witnesses I had planned to call today are not available today.

The Court: Do you expect them to be ready Monday?

Mr. Merwin: I expect them to be.

The Court: Ladies and gentlemen, I indicated, as I outlined, that the case will probably conclude Monday and the balance of the witnesses, unless we run into a problem, I don't anticipate we will, so again you've had a short day and I will thank and excuse you until Monday at 9:00 o'clock, and I anticipate we will conclude the case on Monday unless for some

reason we have a problem and which we don't perceive at this time.

So I do want to admonish you it's your duty not to converse among yourselves or with anyone else the subject

* * * * *

[1969]

Santa Ana, California - Monday, November 30, 1981
Morning Session

(The following proceedings had in open court in the presence of the jury:)

The Court: Good morning, ladies and gentlemen. Usual stipulation, gentlemen?

Mr. Jacobs: Yes.

Mr. Merwin: Yes, your Honor.

The Court: You may proceed, Mr. Merwin.

Mr. Merwin: We will call Phillip Arellano, and the next witness --

Phillip Robert Arellano,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state and spell your full name, please.

The Witness: Phillip Robert Arellano, A-R-E-L-L-A-N-O.

The Clerk: Would you spell Phillip?

The Witness: P- H- I- L- L- I- P.

The Clerk: Thank you. Be seated in the witness stand, please.

(Continued on page 1970; nothing omitted.)

[1970]

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Arellano, do you recognize Bill Payton?

A Yes, I do.

Q Where did you meet Bill?

A In the Orange County jail.

Q When was that?

A Last April.

Q April of 1980?

A 1981.

Q 1981. How long -- were you housed with Mr. Payton?

A I was downstairs, and he was upstairs.

Q How many times did you see him in the Orange County jail?

A Almost every day.

Q Did you discuss religion with him?

A Yes, we did.

Q Did he indicate to you that he considered himself born again?

A Yes, he did.

Q Or committed to a faith?

A Yes.

Q Did this discussion occur frequently or infrequently?

A We talked about it all the time.

Q In your opinion, was he sincere?

[1971]

A Yes.

Q Did you discuss Bible matters?

A Uh-huh, yes.

Q Did he have any influence on you while you were in the Orange County jail?

A He brought me closer to God.

Q And how did that occur?
A By having Bible studies with me and praying.
Q Did you see his interaction with other inmates?
A Yes.
Q How would you describe that?
A I think he had a very good influence on others in there.
Q Did he seem to have a calming influence on other inmates?
A Yes.
Q During these discussions, did you and Bill discuss his feelings toward religion?
A Yes.
Q Your feelings toward religion?
A Yes.
Q And you felt that he brought you closer --
A Uh-huh.
Q -- to God?
A Yes.
Mr. Merwin: I have nothing further. Thank you.

[1972]

The Court: You may inquire.
Mr. Jacobs: Could we approach the bench for a second?
The Court: Surely.
Mr. Jacobs: I don't think we need the reporter.
The Court: Need the reporter, gentlemen?
Mr. Jacobs: I don't think so.
(Continued on page 1973; nothing omitted.)

[1973]

(Discussion between Court and counsel at the bench out of the hearing of the jury and reporter.)

(The following proceedings had in open court in the presence of the jury:)

The Court: Miss reporter, will you please come to the bench.

(The following proceedings had at the bench between Court and counsel out of the hearing of the jury:)

The Court: Okay. Mr. Jacobs.
Mr. Jacobs: Two things I want to get the Court's ruling.

First of all, I wanted to ask this witness what charge he was in on and if he was convicted of it, and I believe there's an objection to those questions,

The Court: Well, you can ask if he's been convicted of a felony. Otherwise, I think we get into misdemeanor areas or some other area.

Mr. Merwin: The nature of the felony I think is inadmissible, too.

Mr. Jacobs: Do you know what it is?
Mr. Merwin: Yes, I do. It's 288(a).

The Court: Well, you can inquire whether he's been convicted of a felony and limit it to that and not go into the nature of it.

Mr. Jacobs: The other things I wanted to ask about, I have information, although I did not intend to call witnesses, that the defendant, besides his religious teaching,

* * * * *

[1978]

mislead the jury where we have a question, negative answer, but the question is pregnant with a positive answer or the implication of a positive answer.

Mr. Jacobs: It may be that I'm going to have very probative rebuttal evidence on that. I can't be sure, your Honor.

The Court: I'll overrule the objections, gentlemen. I'll note the objections.

All right. We'll bring the jury back in.

(The following proceedings had in open court in the presence of the jury:)

The Court: You may inquire.

Phillip Robert Arellano,

called as a witness in behalf of the defendant, having been previously duly sworn, was further examined and testified as follows:

CROSS EXAMINATION

Q By Mr. Jacobs: Mr. Arellano, you were in custody, I take it, in the same module with the defendant from April though August of 1981, is that correct?

A Yes, that's right.

Q And you testified you saw him engaged in various religious activities while you were there with him, is that correct?

A Yes.

Q In addition to these religious activities, did

[1979]

you also have a -- see him -- have occasion to see him gambling in the day room with other prisoners?

A I seen him.

Q You saw him do that, didn't you?

A (Witness nods head in the affirmative.)

Q Did he do that -- he did that rather frequently, didn't he?

A I wouldn't know, because I didn't come out of my cell a lot of times.

Q But you did see him gambling, right?

A Yes.

Q Okay. Now, did you ever have occasion to hear or see the defendant extract money from other inmates to make telephone calls?

A No.

Q You never saw anything like that?

A No.

Q You're sure about that?

A Yes.

Mr. Jacobs: I have nothing further.

The Court: Mr. Merwin?

Mr. Merwin: No further questions.

The Court: Witness be excused?

Mr. Merwin: Yes.

The Court: Thank you, sir. You're excused. Thank you.

Mr. Merwin: Call Dennis Howie.

[1980]

Dennis Ray Howie,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Witness: I can't swear on anything because it tells you in the Bible not to swear on anything, but I will declare. I will declare that what I say is the truth.

The Clerk: Under the pain and penalty of perjury?

The Witness: Sure.

The Clerk: State your full name for the record, sir.

The Witness: Dennis Ray Howie.

The Clerk: Would you spell your last name?

The Witness: H-O-W-I-E.

The Clerk: Thank you. Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Howie, do you know Bill Payton?

A Yes, sir, I do.

Q When did you meet him?

A Approximately four months ago.

Q Where?

A In the Orange County jail.

Q How many times have you had conversation with Mr. Payton since then?

A Approximately 10 or 12 times, somewhere around there.

Q Any of those conversations relate to religious

[1981]

topics?

A Almost all of them do.

Q Has he in any of those conversations indicated he is born again?

A Yes, he has. I know he has.

Q Do you take him to be sincere?

A Yes, I do.

Mr. Merwin: I don't have anything further. Thank you.

Mr. Jacobs: I have no questions.

The Court: Thank you, sir. You are excused.

Mr. Merwin: Keith Dandley.

Keith Douglas Dandley,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record.

The Witness: Keith Douglas Dandley.

The Clerk: Would you spell your first and last name.

The Witness: Keith, K-E-I-T-H. D-A-N-D-L-E-Y.

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Dandley, do you know Bill Payton?

A Yes.

Q When did you first meet Mr. Payton?

A July lst, 1981.

Q Where?

A Orange County jail, mod-A.

[1982]

Q Did you live in the same mod for awhile?

A Yes.

Q For how long?

A About two months.

Q Then did you live in different mods for awhile?

A Yes.

Q How long?

A For about two more months. Now Bill's back down in my mod again.

Q Okay. How many contacts would you say you've had with Bill Payton since July lst, 1981?

A Every day that we were living together and then when he moved I didn't, of course, have any contact with him except for right when we were coming to court, and then every day for the last month.

Q Would you say you've had hundreds of contacts with him?

A Yes.

Q Is religion frequently discussed between you and Bill?

A All the time.

Q Does Bill indicate to you that he's been born again?

A Yes.

Q You think he's sincere?

A Yes.

[1983]

Q Why?

A You can tell. He lives the word of the Bible. He doesn't use any foul language. He doesn't do anything to harm anybody. He likes people. He's always trying to help people out. He helped me.

Q How did he help you?

A He saved my life.

(Continued on page 1984; nothing omitted.)

[1984]

Q How?

A I was going to commit suicide when I got to Orange County jail.

Q How did he help --

A And --

Q -- with that problem?

A Bill showed me the way to the Lord Jesus Christ. And fortunately for myself, I have -- I didn't have to commit suicide.

Q And you attribute that change in your own thinking on suicide to Bill Payton?

A Yes. I didn't have anything left to live for until I found the Lord, and Bill showed me the Lord.

Q Have you seen Bill's interaction with other inmates?

A Yes.

Q How would you describe that?

A Excellent.

Q Does Bill have a calming effect on the mod that he's in?

A Yes. When he moved from our mod up to D-mod, the whole mod fell apart.

Q What do you mean by that?

A Well, about the first week he was gone, four or five fights broke -- broke out. People were on everybody's nerves. But while he was there, we didn't have as much as

[1985]

one incident of any of those things going on.

Q After he returned to the same mod you were in, what was the -- his impact or his apparent impact on that?

A Everything is calm again. It's the Lord working through Bill. Wherever Bill is, the Lord -- the Lord is. And it has a calming effect on everybody.

Q You think Bill would be a positive influence on other inmates if he served a sentence of life in prison?

A I think Bill would be positive influence wherever he was at.

Mr. Merwin: Thank you. I don't have anything further.

CROSS EXAMINATION

Q By Mr. Jacobs: You say the defendant in your word lives the word of the Bible?

A Yes.

Q That's -- he gambles, though, doesn't he?

A No, he doesn't.

Q You never seen him gamble in the day room with other prisoners?

A No, I haven't.

Q And you've seen him every day?

A Yes.

Q How about -- has he -- you ever see him extract money from other prisoners for telephone calls?

A No. Never.

Q Never saw that once?

[1986]

A No.

Q You're sure about that?

A Positive. I got many phone calls from Bill Payton, and I never had to pay a dime.

Q You didn't have to pay for that?

A Sure didn't.

Mr. Jacobs: I have nothing further.

REDIRECT EXAMINATION

Q By Mr. Merwin: Is Bill generous with things that he has?

A If I don't have any cigarettes or candy, whatever Bill's got, I've got. That's the way it's been ever since I've known him.

Mr. Merwin: Thank you. I have nothing further.
Mr. Jacobs: Nothing further.
The Court: You're excused, sir. Thank you.
Mr. Merwin: Could we have a brief conference at the bench with the reporter?
The Court: Surely. Miss Reporter.
Mr. Merwin: Mr. Payton would like to be present. Maybe we can do this in chambers.
The Court: All right.
(The following proceedings had in chambers, court, both counsel and the defendant present:)
The Court: We're in chambers out of the presence of the jury. Mr. Merwin?

* * * * *

[1998]

(The following proceedings had in open court in the presence of the jury:)
Mr. Merwin: I think we've gotten as far as Mr. Palko's name is my recollection.
The Court: You may proceed.

Bruno Martin Palko,

called as a witness in behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q By Mr. Merwin: Mr. Palko, do you know Bill Payton
A Yes, I do.
Q Where did you meet him?
A Orange County jail.
Q When?
A I believe the last part of '79 or the first part of '80.
Q Were you in the same living area?

A Yes, I was.
Q What area was that?
A Mod-A.
Q How long did you live in the same mod with Bill?
A Approximately a year.
Q Did you contact him every day?
A Yes, I did.
Q Did you talk to him frequently?
A Yes, I did.

[1999]

Q Did you talk to him frequently?
A Yes, I did.
Q Any of those discussions center around religion?
A Yes.
Q On his religious views?
A Yes.
Q On yours?
A Yes.
Q Did he indicate that he had been born again?
A Yes.
Q Did you take him to be sincere?
A Yes, I did.
Q Why?
A When I first met Bill Payton before he was a Christian, he was -- his voice seemed to be more loud, you know, and then after he accepted the Lord, he was very gentle spoken, easy going type person.
Q Did you see his interaction with other inmates during the year that you and he were together?
A Yes, I have.
Q How would you describe that impact on other inmates?
A He was helpful as far as I'm concerned. He was helpful to me and he always, if there was any kind of disturbance in the tank, we would try to -- Bill and myself would try to work out

where the police didn't have to come down and shake down our houses and so on.

[2000]

Q Did he have a calming influence on the other inmates?
A Yes.
Q Where are you located now?
A I'm in Chino Prison.
Q That's state prison as opposed to the jail?
A Yes.
Q Were you convicted of a felony and that's what sent you to state prison?
A Yes, sir.
Q Do you feel Bill Payton would have a positive influence on other inmates in prison?
A Yes, I do.
Mr. Merwin: Nothing further.
Mr. Jacobs No questions.
The Court: Thank you. The witness may be excused. Thank you.
Mr. Merwin: Brian Miller.
The Court: Before you call the witness, excuse the jury for about two minutes at this time.
(The following proceedings had in open court out of the presence of the jury:)
The Court: We're on the record. I do want, so there's no confusion and so forth as far as Mr. Jacobs, you're concerned, in view of testimony that's being elicited, I have no -- as I said, I think it's proper, as I said, as

* * * * *

[2006]

(The following proceedings had in open court in the presence of the jury:)

The Court: Usual stipulation, gentlemen?
Mr. Jacobs: For me. Mr. Merwin is outside.
The Court: Do you want to proceed without him?
The Defendant: No.
The Court: Usual stipulation, Mr. Merwin?
Mr. Merwin: Yes, your Honor.
The Court: All right. You may proceed.
Mr. Merwin: Next witness is Deputy Engen.
Vincent Woodrow Engen,
called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:
The Clerk: State your full name for the record.
The Witness: Vincent Woodrow Engen.
The Clerk: Spell your last name.
The Witness: E-N-G-E-N.

DIRECT EXAMINATION

Q By Mr. Merwin: What is your occupation?
A I'm a deputy sheriff.
Q For the county of Orange?
A Orange County, yes, sir.
Q How long have you been employed by the county of Orange as a deputy sheriff?
A Approximately one year and ten months.
(Continued on page 2007; nothing omitted.)

[2007]

Q And during that period, have you been assigned to the jail?
A Yes, sir.
Q That's the Orange County men's jail?
A Yes, sir.
Q You recognize Bill Payton?
A Yes, sir, I do.

Q When did you first meet Bill Payton?
A About nine, ten months ago.
Q And how did you come to meet Bill Payton?
A I was working as a module deputy for the mod that he's housed in.
Q Now, what is a mod? Maybe you can define that for us?
A A mod is an area inside the jail in which the inmates are housed. They're individual tanks, and they are set up according to an inmate's crimes and his physical stature.
Q And your position relative to Bill's mod was what?
A Module deputy. I run the mod.
Q How many hours a day are you present there running a mod?
A Eight hours a day.
Q How many days a week?
A Five days a week.
Q During that 40-hour span on an average week,

[2008]

how many times did you come into contact with Bill Payton?
A Quite often. I -- it would be impossible to say. But more often then [sic] any other inmate.
Q Have you ever observed any Bible study sessions that Bill Payton was involved in?
A Yes, I have.
Q And where did those occur?
A Inside the vestibule, which -- that's an adjacent cell that leads out into the hallway.
Q Did you participate in any of those yourself?
A No, I didn't.
Q Did you observe Mr. Payton participate in any of those?
A Yes, I did.
Q Did you observe other inmates participating in them?
A Yes, I did.

Q How many other inmates would you say were also involved in some of these sessions?
A A low of four to a high of maybe 12.
Q Did Mr. Payton seem to be leading the Bible study session?
A The majority of the time, yes.
Q How long did these sessions last?
A Between one to three hours.
Q And how many would you say total there were that

[2009]

involved Bible study or Bible discussion?
A I don't understand what you're --
Q How many of these different -- or how many different sessions have you observed?
A I would say probably 15.
Q How many -- I'm sorry, I forgot whether I asked you this. How many other inmates would be involved on an average?
A Between four to twelve.
Q Four to twelve?
A Yeah.
Q Have you ever personally discussed Bill's religious views with him?
A No, I haven't.
Q Do you have an opportunity to observe his interaction with the other inmates apart from these Bible study classes?
A Yes, I do.

(Continued on page 2010; nothing omitted.)

[2010]

Q How do you describe that interaction?
A He gets along very well with the other inmates.
Q Does he seem to have a leadership role with the other inmates?

A Definitely.

Q Would you say his influence with the other inmates you've observed has been positive?

A Yes, sir, I would.

Mr. Merwin: Thank you. I have nothing further.

The Court: You may inquire.

CROSS EXAMINATION

Q By Mr. Jacobs: Yes. How often did you observe these religious meetings, you say every month, once a month or what?

A Approximately two a month.

Q Two a month. And you never participated; is that correct?

A No, sir.

Q In the module, there's upstairs and downstairs?

A Yes, sir, there are.

Q You sit at like a desk; is that correct?

A Yes, sir, I do.

Q Leading in the hallway down the module?

A Yes, sir.

Q You can't see all of the day room activity that goes on in the day room; is that correct?

[2011]

A No, sir. I can see about one-third of it.

Q Did you ever -- while you were in the module, deputy in charge of the defendant's tank, was it ever brought to your attention that Mr. Payton was extracting commissary from other prisoners for phone calls?

A Yes, sir. One time.

Q And was that by another inmate?

A Yes, sir.

Q Now, how is it possible procedurally, how could Mr. Payton get a phone call for another inmate? Is there a procedure that he could follow?

A Well, he was out on the broom, which means he was out cleaning when the other prisoners were in lockdown. He's cleaning up trash and he's the only one that has access to them.

Q Would he have to convince you to give somebody else a phone call for them to get a phone call?

A Yes, in most cases.

Q While you were the module deputy, were there some occasions when Mr. Payton asked you to give phone calls to other prisoners?

A Yes, there were.

Q Did you go ahead and let the other prisoners have phone calls at his request?

A Usually I did.

Mr. Jacobs: Thank you. I have nothing further.

[2012]

REDIRECT EXAMINATION

Q By Mr. Merwin: Were you glad to have Mr. Payton in your module?

A Yes, I was.

Q Why?

A Because of his ability to calm the other inmates.

Q Did Mr. Payton ever come to you and inform you there was a problem developing in that module?

A Yes, he did.

Q Did you take some corrective measure?

A Yes. I was able to head off several problems.

Q As a result of Mr. Payton's statements to you?

A Yes, sir.

Mr. Merwin: I have nothing further.

RECROSS EXAMINATION

Q By Mr. Jacobs: I guess what you're saying, Mr. Payton

would inform you of what other inmates were up to that might lead to problems for you; is that correct?

A Yes.

Q So in other words he would tell you things that other people were doing and you appreciated knowing that; is that correct?

A Yes, sir.

Q And in essence it would get him favors from you like being on the broom for doing that; right?

A Yes, sir.

[2013]

Q Okay. And were you aware while Mr. Payton was in custody that he engaged in two mutual combat situations in the jail.

Mr. Merwin: Objection, assumes facts not in evidence.

The Court: Overruled.

Mr. Merwin: The way he stated the question, I think in effect asserts that it happened.

The Court: I will sustain the objection. You can rephrase it.

Q By Mr. Jacobs: Okay. Were you aware of Mr. Payton ever engaging in mutual combat with other prisoners while you were on duty in the module?

A No, not while I was on duty.

Q From where you're located, if a fight breaks out, you see it all the time?

A Not all the time.

Q Why is that; because of your position?

A Yes, sir.

Q Are fights always brought to your attention in the module immediately, or do you sometimes find out later if never?

A Sometimes never, sometimes hours or even days later.

Mr. Jacobs: Thank you. Nothing further.

FURTHER REDIRECT EXAMINATION

Q By Mr. Merwin: Did you ever see Mr. Payton assist

[2014]

in breaking up a fight?

A No, I didn't.

Q Or prevent one from developing?

A No, I never personally saw that.

Mr. Merwin: Excuse me for just a moment.

Q By Mr. Merwin: Deputy Engen, you testified that an inmate told you that Mr. Payton had asked for or required some kind of extracting some money was the question, in other words, to get a phone call?

A Yes.

Q Is that something that you know of your own knowledge or is that something you were told by an inmate?

A Something I was told by an inmate.

Q And you have one such report?

A Yes, sir.

Mr. Merwin: Thank you. I have nothing further.

Mr. Jacobs: Nothing further.

The Court: All right. Thank you, gentlemen.

Mr. Jacobs: Could I approach the bench for a second?

The Court: Surely.

(Continued on page 2015; nothing omitted.)

[2015]

(Whereupon there was a discussion at the bench among Court and counsel out of the hearing of the jury and reporter.)

The Court: Anything additional, gentlemen?

Mr. Jacobs: No.

Mr. Merwin: No, your Honor. Thank you.

The Court: Thank you, sir. You're excused.

You may call your next witness.
Mr. Merwin: Mrs. Virginia Payton.
The Clerk: Raise your right hand, please.

Virginia Payton,

called as a witness in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record, please.
The Witness. Virginia Payton.
The Clerk: Would you spell your last name?
The Witness: P-A-Y-T-O-N.
The Clerk: Be seated in the witness stand, please.

DIRECT EXAMINATION

Q By Mr. Merwin: Mrs. Payton, you're Bill Payton's mother?
A Yes.
Q And where do you live?
A In Leisure World. Laguna Hills.
Q With whom?
A My husband.

[2016]

Q He's seated --
A Mason Payton.
Q While Bill has been in the Orange County men's jail, have you been able to visit him there?
A Yes.
Q How often?
A At least every other week.
Q And how long are each of those visits?
A We're only allowed half an hour.
Q And where do those visits occur? Do you know the area of the jail where they occur?
A First floor.

Q You talk on the phone?
A Yes.
Q Through a glass window?
A Yes.
Q On any of these occasions, have you and Bill discussed religion?
A Always. Every occasion.
Q And who brings up the subject?
A Bill.
Q Have you on any of these occasions prayed together?
A Yes.
Q Do you ever bring him any materials to read?
A Yes. He got --
Q What kind --

[2017]

A -- permission --
Q What kind of materials?
A Religion materials.
Q And who suggests the nature of them? Do you select them and bring them or did Bill ask for them and you bring the material?
A That's all he's ever had. That's all he's ever wanted, just religious materials.
Q Have you seen any change in Bill from before he was in the jail to now?
A Oh, yes.
Q How would you describe the change?
A Well, he's totally immersed in the Lord. He -- he's an instrument of the Lord as far as he's concerned. He's a -- he doesn't think of anything else. And he's -- I don't know what else you'd say. He's -- he's always been a fairly calm temperament, but he's very even.
Q Has he told you that he feels he's born again?
A Yes.

Q Or committed?
A Yes, at the beginning, uh-huh.
Q Do you take him to be sincere when he says it?
A Oh, I know it.
Mr. Merwin: I have nothing further. Thank you.
Mr. Jacobs: I don't have any questions.
The Court: Thank you, ma'am. You're excused.

[2018]

You may call your next witness.

Mr. Merwin: I don't have any other witnesses until this afternoon, your Honor.

The Court: Could I see you gentlemen at the bench without the reporter for just a minute?

(Whereupon there was a discussion at the bench among Court and counsel out of the hearing of the jury and reporter.)

The Court: Okay, ladies and gentlemen. What we're going to do is take an early break.

Mr. Merwin: Excuse me, your Honor. Before you dismiss the jury, could I have a brief moment here?

The Court: Sure.

(Discussion between Mr. Merwin and the defendant out of the hearing of the jury and reporter.)

Mr. Merwin: Thank you, your Honor.

(Continued on page 2019; nothing omitted.)

* * * * *

[December 1, 1981]
[2096]

The Court will indicate, all those have been requested by the plaintiff and will be given.

Are there any objections or any problems with regard to those three instructions?

Mr. Merwin: I would like to have 8.84.1 modified by taking paragraph k in CALJIC and rewriting it so it reads as follows: "Any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, including --" and this is language out of 190.3 of the Penal Code, "-- evidence of the defendant's character, background, history, mental condition and physical condition."

The problem I have with it, the way it reads now, is it appears to me that --

Mr. Jacobs: Could I see what you read from?

Mr. Merwin: Yes, section 190.3.

A juror could read that as saying, well, gee, there are a lot of interesting things about Mr. Payton, but they don't have anything to do with the crime. They have something to do with his potential for rehabilitation or his character or his background, but they don't have anything to do with the crime itself and I know that the legislation, 190.3 was designed with the view toward including evidence of background character, whatever it was offered by the defense to extenuate the gravity of the situation more than the gravity of the crime.

[2097]

Mr. Jacobs: I think with the defendant's character, background, history, mental condition and physical condition, they're talking about his -- the other areas, "g," whether he was under extreme duress, whether or not he had -- "d," whether he had a mental -- extreme mental or emotional disturbance and I think "k," unlike the way Mr. Merwin wants to change it, any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, they're probably talking about circumstances attending the crime. They're not talking about character, background, history, mental condition and physical condition, and I think his character, background, history, mental condition, physical -- mental

condition, physical condition are supposed to come in under other areas, not under "k."

Mr. Merwin: Seems to me the other areas that touch on --

Mr. Jacobs: I think Mr. Merwin can argue that we had presented this under "k," but it's not what " k" says either in the statute or CALJIC.

The Court: Let's look at our most recent -- when was 190.3 passed, or the last time? What are we looking at?

Mr. Jacobs: It says added November 7, '78.

The Court: November, '78. Okay. And we're talking about 8.84.1.

Mr. Jacobs: You want the Code section he's reading from?

[2098]

The Court: No. I'm looking, as I said -- okay. We have -- I'm looking at CALJIC '81 supplement and to see, as I said, if they've added anything at all which would expand or change in any way and put any language requested by Mr. Merwin in this particular case, and I'm looking at 1980, see if we have anything, any modifications in this.

Mr. Jacobs: I think what they're --

The Court: We have 8.84, penalty trial, indicating that if the defendant were a minor, which doesn't have anything to do with what we're doing. When was -- I'm looking at the fourth edition.

Mr. Jacobs: This is the '81 supplement and --

The Court: I'm looking at the --

Mr. Jacobs: '78 statute, though.

The Court: Well, the thing I'm puzzled with, as I say, looking at 190.3 which is passed, what, in --

Mr. Jacobs: '78.

The Court: -- '78, and they have had, as I said, the supplements each year and we've had no change through '81 in the supplement. Mr. Merwin, that's the thing. As I said, I'm somewhat concerned with the fact they don't spell it out when

they give us the ten factors If, in fact, we should include more of the language of 190.3.

Mr. Jacobs: I don't think there's any ambiguity because those -- his history, his character, mental condition and physical condition would come in to play under other categories,

[2099]

specifically "d," "g," and "h."

The Court: "D" picks up part of it.

Mr. Jacobs: Then "g" and "h," but I don't think that's at all what they mean by "k." I don't think his background or character has anything to do with "k" because if it did, they'd say it. They'd say a circumstance.

The Court: Let me see the code section.

Mr. Jacobs: It's the same as CALJIC.

Mr. Merwin: While you're reading and considering that, I also want to request there be an "l" added which says they may take into consideration the defendant's potential for rehabilitation.

The Court: Well, with regard to "l," of course --

(Continued on page 2100; nothing omitted.)

[2100]

Mr. Jacobs: You want your argument to become the law? Is that what you're trying to do?

The Court: Well, as I said, that will be denied. I don't have any problem with denying "l."

Mr. Jacobs: Can my argument become the law, too?

The Court: I don't think, as I said, with regard to the situation where we have the factors set forth that the Court's going to start adding categories. I'll deny that request for "l."

I'm back to reading the 190.3, of course, where they go ahead and completely define 190.3 in toto, and then I assume 190.3 -- and I haven't checked it out --

Mr. Jacobs: It's verbatim.
The Court: Verbatim.
I assume CALJIC 8.84.1 --
Mr. Jacobs: That's it.
The Court: -- is a complete lifting, the factors "a" through " k." And with regard to your request to add the language: defendant's character, background, history, mental condition and physical condition, I assume, as I said, that the legislatures [sic] assume that they had picked that up on "a" through "k." I assume that's the People's argument.
Mr. Jacobs: I think to add what Mr. Merwin wants to add would be directly contrary to what they have in "k." That's to add -- that's, in essence, to create another "l," to adjust pointblank [sic] character, background, history.

[2101]

That's not what they meant. They meant what they have in "d," "g" and the other ones. It has to be something about his background or history that relates to something they felt was important.

And I think -- I read "k" as being a circumstance attending a crime. That's the way I read it. Not a factor and background, the defendant's history; or else the Legislature would have said that.

The Court: Well, I assume, as I said -- and believe me, this is my interpretation -- but I assume, as I said, from "k," the "any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime," that they are incorporating from paragraph 1, as I said, that the defendant's character, background, history, mental condition and physical condition may, as I said, be applicable through "k."

I didn't draft it. I'm reluctant, as I said, to, this particular case, change a CALJIC instruction wherein it's verbatim from the 190.3 statute, Mr. Merwin.

I certainly see what your argument is directed towards. And I certainly would assume that you are -- you argue those particular factors, it's clearly proper argument as included under "k."

I see your position for the edification and clarification of the jury. But I'm going to refuse, as I said, to modify the instruction. I think, as I said, that

[2102]

it's clear what was intended.

I assume you gentlemen, as I said, in your argument can certainly relate -- relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category "k" and certainly make a clear argument to the jury.

Mr. Merwin: The only problem I have with that is that "k," at least taken at face value, refers to extenuating the gravity of the crime, even though it's not a legal excuse for the crime. It doesn't sound to me like "k" incorporates the other factors, even though I'm sure that was the intent of the Legislature.
Mr. Jacobs: I don't think it was.
Mr. Merwin: That that be something that the defense can offer.
The Court: Well, -- he's -- I think he's stuck if that -- we're arguing that that's applicable
Mr. Jacobs: I think. I don't think it is. But I think he's stuck with trying to argue it. I don't think we should take his argument and make it the law.
Mr. Merwin: Is the Court going to preclude me from arguing rehabilitation or --
The Court: No.
Mr. Jacobs: Argue anything you want.

[2103]

Mr. Merwin: As applying or being subsumed within "k."

The Court: I assume that any other circumstance is -- which extenuates the gravity of the crime is a -- and I may be wrong -- but I assume that's the catch-all, and it was intended, as I said, for all these factors, as I said, that don't fall into the other areas. And I realize there is a carry-over that some of these could be argued in a different category.

But I think the way I read the cases -- and there isn't much case law -- and the way I read "k," I think, as I said, it's wide open. I found no -- you know, within reason, as I said, it seems to me, as I said, that those areas are certainly open for argument.

I certainly am not going to preclude it, your arguing that. I think, as I said, that the reason "k" doesn't include character, background, history, mental condition and physical condition is that they aren't limiting necessarily to that "k" as sort of a no-holds barred within proper restrictions. The way I read the cases, it's almost anything can come in on behalf of the defendant, be argued. And I think, as I said, that's probably one of the reasons I haven't specifically tried to limit "k" with the language that you want because you're also expanding, want to request "l," and I think that's the reason, as I said, that they haven't put in -- or been more delineating in "k" is because you -- the factors that you're arguing in "l" I think can

[2104]

be included in "k."

And if we use the language that you want in "k," then we have to in fact -- we're going to be that definitive adding "l." So I think "k" is the all encompassing one that includes both what you want added in your argument for "l," which is basically why I'm not giving it, so . . .

Mr. Merwin: One last observation.

The Court: Sure.

Mr. Merwin: My only problem is I think we all agree that that's the law, but the jury's not going to know.

The Court: I agree with you. Probably as I said from your standpoint, I'm not quarreling with -- if I were in your position -- that you would like to add those -- particular language: character, background, history, mental condition, so forth in "k" and add an "l." And I think, as I said, it would be certainly -- I would be making the same request.

But I'm going to deny it, and for the reasons stated.

(Continued on page 2105; nothing omitted.)

[2105]

Anything else, gentlemen?

Mr. Merwin: This doesn't relate to a jury instruction.

The Court: Anything else? I think we're set on the instructions, so I'm sure -- would you make sure I have mine and the concluding instruction, I think, as I said, as modified is proper and you gentlemen reviewed that, so --

Mr. Merwin: I do think that we ought to specifically give the instruction on corpus because the only evidence in the record that relates to extracting money for phone calls is a hearsay statement which was not even proven to be true and that -- in that regard there's another way to solve that problem. Maybe what we could do is this. When that came in, it took me by surprise for two reasons. One is, I thought there was an understanding, an existing court order that before that question was asked of any witness, that we'd have a 402 hearing. That's the way we handled every previous witness when that issue was going to be asked.

So it was asked and the answer was in before I really had a chance to object, even though it was obvious hearsay and I didn't want to make a delayed objection for fear it would bring knowledge to it.

Now, we have a note from Sharon Gruber dated today, "the prosecution mentioned extracting money for phone calls.

Please ask him to explain what that means."

It's obvious that did not escape the attention of the jury, just because I didn't object to it and bring

* * * * *

[2113]

(The following proceedings had in open court in the presence of the jury:)

The Court: Good morning, ladies and gentlemen. Usual stipulation?

Mr. Jacobs: Yes.

Mr. Merwin: Yes, your Honor.

The Court: I think you gentlemen had one stipulation before you argued?

Mr. Jacobs: We are willing to stipulate to the defendant's age.

Mr. Merwin: Yes. We have stipulated he's 28 years old.

The Court: Stipulation will be accepted.

With that in mind, the People may make their opening statement. I do want to indicate, as I did at the prior -- at the guilt phase of this proceeding, that the argument of counsel is not evidence and you gentlemen and ladies should rely on your own recollection of the evidence, and if it isn't as you recall, strictly inadvertance [sic] on the part of both of these gentlemen, so with that in mind, rely on your own recollection. This is not evidence but argument. You may proceed, Mr. Jacobs.

(Continued on page 2114; nothing omitted.)

[2114]

Mr. Jacobs: Thank you. At this time, ladies and gentlemen, I'd like to thank all of you for your close attention throughout the trial.

At this point, before the end of the second stage, the last stage of the trial, it's again my opportunity, my last opportunity

to address you on the evidence in what's referred to as closing argument.

In this, what I have to say to you again, I'm going to basically break up what I have to say into two parts. I'm going to talk to you a little bit about the law, which is going to be very brief.

And then I'm going to talk to you about the facts and about the death penalty.

Unlike the argument at the guilt phase, there is no moving party or no party with a burden. I am not going to have a second chance or second opportunity to address you.

Each side in this proceeding will be giving just one argument. So I'm going to argue first, and then Mr. Merwin will have a chance to make his statements to you.

And then you're going to be instructed on the law, and then the case is going to be submitted to you.

As I said, first thing I want to do -- and it's going to take just a few minutes -- is I want to run through the CALJIC or the jury instructions you're going to get, and then I'm going to talk about the facts of the case and

[2115]

the penalties involved.

I'm going to try not to repeat anything I said to you about the facts of the case in the guilt phase. However, I am going to refer with a different viewpoint perhaps and get back and talk to the facts and circumstances of the crime because as you're going to see, that is a very important factor for you to consider in this stage of the trial.

To begin with, in essence, and I'm summarizing and skipping, you're going to be instructed by the Court at the conclusion of argument that it is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special

circumstances charged in the case have been specially found to be true.

And that's why we're here. That's why we're in the second stage.

(Continued on page 2116; nothing omitted.)

[2116]

You then are going to be instructed as follows, and this has to do with the eleven factors that you've heard about from the beginning back when we had jury selection, and you're going to be instructed in essence as follows. I'm going to go through them very quickly and then I'm going to talk them again and apply them to the facts, so you don't need to take notes and the Court's going to give them to you and you will have them in the jury room.

In determining which penalty is to be imposed upon the defendant, you should consider all the evidence which has been received during any part of the trial of this case. You should take into account and be guided by the following factors:

"A," the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. In other words, all the evidence you heard in the guilt phase.

"B," the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or expressed or implied force to use violence.

"C," the presence or absence of any prior felony conviction.

"D," whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

[2117]

"E," whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"F," whether or not the offenses committed [sic] under circumstances which the defendant reasonably believed to be moral justification or extenuation for his conduct.

"G," whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"H," whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or effects of intoxication.

"I," the age of the defendant at the time of the crime.

"J," whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"K," any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime.

As you can all see from my very quick reading, I'm going to go over them, some of these are applicable and some of them are not, depending on your findings.

I'm going to get back to those and discuss with

[2118]

you the evidence in some detail, but before I do that then you'll be read the final and concluding instruction on what you do with these factors.

It would be your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole shall be imposed upon this defendant.

After having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider,

take into account and be guided by the applicable factors of aggravating and mitigated circumstances upon which you have been instructed.

In other words, the factors I have just read to you.

If you should conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

So, as I've just told you and as we talked about in voir dire, it's a weighing process as far as determining the penalty that you should impose, the jury is expected or supposed to go through a weighing process of the factors I have just described.

Now, in argument I considered putting those eleven

[2119]

factors on the board and showing which ones were applicable and then perhaps to aid you in weighing and, say, take a thousand points and distribute them over the factors.

In view of the subject, what we're talking about, the death penalty, the type of the case, I decided that wasn't really appropriate or necessary and I think your too intelligent for me to have to do that.

(Continued on page 2120; nothing omitted.)

[2120]

Basically, the facts of the case and what this defendant has been convicted of doing is the primary thing I'm going to talk to you about. And what the appropriate penalty for what he did should be.

Before I do that, I want to go back and go through those factors very briefly and comment to you -- at least tell you which ones seem to be applicable and which ones do not.

Okay. "A." The circumstances of the crime, the special circumstances, what the defendant did to Mrs. Montgomery, that is certainly applicable and an aggravating factor that should be entitled to great weight.

"B," the presence of other criminal conduct showing force or violence. Well, we have the facts involving the stabbing of the two Pensingers, and we have the evidence you heard having to do with Mrs. Stone. That also is an applicable factor that should be entitled to weight.

"C," prior felony convictions. We have two felony convictions in 1976, so that is applicable. And it's an aggravating factor. He had possession of controlled substance and statutory rape, both in 1976.

"D," whether the defendant was under extreme mental or emotional distress. Haven't heard any evidence on it. I'd submit it's not applicable.

"E," whether the victim participated in defendant's homicidal conduct. That's clearly not the case. That's

[2121]

not applicable either.

"F," did the defendant have reasonable belief or moral justification in what he did? That's clearly not applicable.

"G," was defendant acting under extreme duress or domination of another? Haven't heard any evidence as to that. That's not applicable.

"H," was the defendant impaired by a mental disease preventing him from conforming his conduct to the requirements of the law? We have heard no evidence of defendant's mental disease. That also would not be applicable.

"I," defendant's age. Twenty-eight? I guess that's applicable. Some of you might consider that not to be a factor. Some of you might consider that young, to be somewhat mitigating.

"J," was defendant merely an accomplice? That's not applicable. He was not an accomplice. He was the perpetrator.

And "k." In any other circumstance which extenuates or lessens the gravity of the crime. I want to stop and talk to you about "k" for just a second because -- and go over the wording.

"K" says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact -- okay? -- some factor at the

[2122]

time of the offense that somehow operates to reduce the gravity for what the defendant did.

It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.

Mr. Merwin: Excuse me, your Honor.

Mr. Jacobs: And how the defendant --

Mr. Merwin: I'm sorry to interrupt. Could we approach the bench?

The Court: Surely.

Mr. Merwin: With the reporter.

(The following proceedings had among court and counsel at the bench out of the hearing of the jury:)

Mr. Merwin: I don't know if the Court heard that part of the argument, but I think that's completely contrary to what we all agreed in chambers on the record "k" was designed to apply to.

And I think this justifies a mistrial and move for a mistrial right now on prosecutorial misconduct.

Mr. Jacobs: He's wrong.

Mr. Merwin: Maybe the Court ought to have that portion reread.

The Court: Well, as I understand the comments of the prosecutor is that they feel that the religious aspect of this as far as being a mitigating factor does not apply because

[2123]

it took place after the crime. Is that your position, Mr. Jacobs?

Mr. Jacobs: Yeah, it doesn't read into "k."

There's no way it says it has to extenuate the gravity of the crime. If he wants to argue it does, that's his problem. But it doesn't.

Mr. Merwin: I thought we'd agreed that that was the only reason for not giving the --

The Court: I think the -- well, the Court indicated, as I said, that -- I assumed in "k" that you were going to argue this was -- you know, goes to his background, rehabilitation and so forth. I think, as I said, it's a fair comment on either side, as I said. What his position is is [sic] that -- the argument of the People is that --. Well, I think you can argue it either way, gentlemen. As I said, I'm just going to indicate to the jurors, as I said, that again, the general comment, this is not evidence.

Mr. Jacobs: I don't want you to indicate anything because it's permissible argument. I think he's misinterpreting the law, and I just want to argue my case.

The Court: Well, --

Mr. Merwin: Then I'd like to renew the request to modify the instruction to add the language from 190.3.

The Court: Well, I'd decline to do that at this time. I think you gentlemen are entitled to argue that under "k," that you can make that argument either way. So again, I'm just going to indicate to the jury that that – what you

[2124]

gentlemen say is not evidence, and I'll not admonish them in any respect.

(The following proceedings had in open court in the presence of the jury:)

The Court: Indicate to you, ladies and gentlemen, again I want to emphasize to you that the comments by both the

prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective.

So with that in mind, you may continue, Mr. Jacobs

Mr. Jacobs: Thank you.

(Continued on page 2125; nothing omitted.)

[2125]

Referring back to "k" which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.

The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

Mr. Merwin will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when -- under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense.

What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all.

You have not heard any evidence of mitigation in this trial.

I want to talk to you about the facts of the case and the death penalty. I have gone over with you the factors and I'm not going to spend too much time on the factors except for the first one.

[2126]

The defendant in this case deserves the death penalty not for his felony priors, not for stabbing Mrs. Stone, not even for stabbing Mrs. Pensinger 40 times and her son 23 times. Those acts may operate to seal the defendant's fate and to tell us what kind of person he is. But what he deserves the death penalty for is what he did to Mrs. Montgomery.

If that was all the evidence we had, if all the evidence before you were the crimes and the act to Mrs. Montgomery, that in itself should warrant the death penalty.

I'm going to talk about the death of Mrs. Montgomery and the evidence you heard regarding what exactly the defendant did to her. I'm going to talk to it a little bit differently, little bit more graphically than I did in the guilt phase because there was a different issue there.

The issue there was whether it was first degree murder and special circumstances, and I'm going to talk to you a little more graphically now, even though it's not pleasant, that what the defendant did to that woman, because it should be said.

The photographs of Mrs. Montgomery at the scene depicting something that must be very difficult for all of us to view, depicts the face of death on the victim, of a very violent killing. I'm sure, especially for those of you who have never seen it before, that's something very hard to look at, and those photographs seem particularly

[2127]

pathetic and horrible when viewing a young, pretty woman who was cut down when -- before she ever really had a chance to live and there was no reason for her to die.

Dr. Yatar, the autopsy surgeon, put it well in describing her death when he said her wounds would be fatal in ten minutes, shock and unconsciousness would take place in about five minutes and by then she could no longer resist and then

quote from him, he said, "the victim would very slowly bleed to death."

So from the evidence, and this is difficult to talk about, but I think it's very clear what was happening to Mrs. Montgomery as she lay dying in her own blood during that ten-minute period.

Well, it seems in all likelihood the defendant was still stabbing her. She probably still resisted as long as she could, from the nail marks on the defendant's back, from the knife wounds on her hands and legs.

The worst part, though, from the bloodstains on her thighs and hips makes it very obvious that the defendant's body was still pressed up against her and he was still engaged in sexual intercourse with her even as she lay dying.

If that's not bad enough, and some of you may recall the evidence from the guilt phase, some of you may have asked yourselves where did the large amount of blood on the defendant's mouth and face come from, which his wife saw when he came home that morning.

[2128]

You may recall other evidence shows that there was saliva on the victim's left breast. All significant large amounts of blood, as you can see on the photographs of Mrs. -- on Mrs. Montgomery's body are from the waist down.

So, ladies and gentlemen, here we have a defendant who feeds on the blood of his victim while she is lying dying and this is the type of case and the type of defendant that the death penalty was designed for.

Here also is a defendant who in his words to Alex Garcia has a "urge to kill" and why should we give a defendant to [sic] feed that urge again. Even when he -- if in prison, what if Mr. Payton gets that urge to kill, if he sees the back of a prison guard again.

Here's a defendant who views all women as his potential victims, who wants to rape and stab them. Why should we give this defendant another chance of finding another victim.

The people through the Legislature have enacted the death penalty statute and you, as representatives of society get to decide if this defendant and this type of crime deserves the utmost penalty.

I suppose somewhere there must be a line between what is just a crime or just a murder, if you'll excuse the expression "just," and what is an atrocity, and this case is an atrocity and I don't think the defense will even refute that.

[2129]

For what the defendant did to Mrs. Montgomery, he deserves the death penalty, and there is nothing that I could think of that could conceivably mitigate this type of murder.

To vote for life without possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and you've heard no evidence of any mitigating factors.

Is this a mitigated murder? Do the facts and the defendant's participation in what he did that mitigated.

If you return a verdict of life without possibility of parole, that is what you would be saying, that this is a mitigated killing.

I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors, and I certainly don't mean to demean a religion by any way in what I say.

(Continued on page 2130; nothing omitted.)

[2130]

I don't think that religion was meant to be a use -- to be used as a shield to hide behind for what you've done or to whitewash what you've done, and I'd like to point out -- I'm sure all of you are aware -- everybody seems to get religion in jail when facing the death penalty.

State prison is full of people who get religion when they are in jail. Just like the defendant's witnesses.

The other evidence that the defense has is they call Miss Seglie, and she reads us excerpts from the defendant's autobiography offered to show the style. Okay? So this is supposed to show the defendant's intelligence, his sensitivity, how smart he is. And you're supposed to be impressed and moved because he can write these moving paragraphs.

And what does he write about? Okay? Here he rapes a girl, kills her, tries to kill two other people, he runs off to Florida and he sits with his feet in the sand and the eyes in (sic) the ocean, writing about his -- his feelings, and he's going to write his memoirs and his autobiography. And life is very tough for a fugitive rapist/murderer. While Miss Seglie was reading these nice excerpts, you know what I was thinking about? I was thinking about Miss [sic] Montgomery. Okay?

How about Mrs. Montgomery? She's never going to be able to put her feet in the sand. She's never going to be able to look out at the ocean. She's never going to be able to be with her husband again. And why not? Because

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the defendant slaughtered her, like an animal. That's why not.

So after he finishes what he does to her and runs off to Florida and he gets caught, then he becomes a newborn Christian, after he's in custody.

And there's a good reason why he becomes a Christian after he gets in custody. And that is, he has no remorse for what

he did to Mrs. Montgomery. The only remorse he has is for his own situation. That's why he doesn't get religion until after he's caught. New found religion can't whitewash or change the past.

I just have a few more concluding remarks. Mr. Merwin is a very fine trial attorney. And he will urge you in essence setting aside or ignoring the facts to spare his client the ultimate penalty and not to execute him because now he's a good Christian, maybe, and he helps the module deputy and he is a leader of inmates in jail.

And I suppose that there must be something moving about a man asking for mercy, regardless of what the man he represents has done.

Before we listen to the pleas of mercy from this defendant, maybe we should think about the victim. Did the defendant show her mercy? The poor woman was raped probably at least twice and stabbed 12 times.

You don't think she begged for mercy? What mercy did the defendant show her? If she didn't ask for mercy

[2132]

verbally, you don't think she cried out for mercy with her eyes or her body?

And what was the defendant's reaction to her pleas for mercy? And what does he do after he finishes with that victim?

He picks up the knife and only bending the blade prevents him from killing two more people the same morning.

I ask you to ask yourselves: Is this the type of defendant from whom we should listen to pleas for mercy?

Mr. Merwin will tell you this is a defendant who can be rehabilitated because he's a good Christian and he helps the module deputy.

In 1973, he stabbed Mrs. Stone. In 1976, he was convicted of two felony convictions. In 1981, he rapes and murders a girl and tries to kill two other people. You think he's going to be rehabilitated?

The law in its simplicity is that the aggravating -- if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty.

How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, her -- Blane [sic] Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old. This is not close.

You haven't heard anything to mitigate what he's

[2133]

done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery, and I really doubt if Mr. Merwin would dispute that breakdown of the facts.

I don't suppose it's very easy for anyone to vote for the death penalty in any case. What Mr. Payton did in the small house in Garden Grove, May 26, 1980, under the law of the state of California, he has forfeited whatever right he has to live. To anyone who believes that the death penalty has any place at all in our society, that is the only just and fair result.

To vote for the death penalty in this case's decision, all of you should be able to live with today, tomorrow, next week and 20 years from now.

Jury selection, I asked each of you in the form of a hypothetical question: If the aggravating factors outweigh the mitigating, could you vote for the death penalty? All of you said you could.

Just as in the hypothetical, I ask you, the actual time to make that decision now is here.

I ask each of you at this time in upholding the law that each of you have sworn to enforce to return a verdict sentencing Mr. Payton to the death penalty.

Thank you.

(Continued on page 2134; nothing omitted.)

[2134]

The Court: Mr. Merwin.

Mr. Merwin: Could we have about five minutes, your Honor?

The Court: Sure.

Mr. Merwin: Thank you.

The Court: Ladies and gentlemen, we will take a five-minute break, please.

(Morning recess.)

(The following proceedings had in open court in the presence of the jury:)

The Court: Usual stipulation, gentlemen?

Mr. Merwin: Yes, your Honor.

The Court: You may proceed.

Mr. Merwin: Ladies and gentlemen, I was going to begin by reading some excerpts out of the CALJIC or the instructions that we all operate by, but I don't think that is necessary. They have been read to you once and I'll repeat the various factors and the language of the law as we come to this individually.

Before I get to the remarks I prepared, I'd like to make a few comments about the argument we have just heard.

First, there are portions of it with which I agree. I agree that many of the factors, and you'll see, as I go through them, are just plain not applicable.

The law says take into account, be guided by and consider the following factors if applicable. I agree with

[2135]

that observation.

I think some of the other observations in terms of what the evidence shows are exaggerations or perhaps deliberate efforts to inflame you to reach a verdict that is not based on the evidence, and that, of course, offends me.

I think the comment about blood on the face leading inevitably to the fact that he is basically a vampire is just a fabrication. How do we know?

We know there's blood on his hands. We know that he has hands. We know that his hands touched blood. We know that hands go to the face. We also know the bathroom right across the room was used, so why are we led inescapably to the conclusion the prosecutor wants you to adopt that he was a vampire. I think that is ridiculous.

(Continued on page 2136; nothing omitted.)

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There's another comment that I think offended me even worse, and I think possibly offends a lot of us, and that was the lighthearted, almost forthy [sic] way in which Mr. Payton's religion is being treated. Almost as if that's a copout.

And I don't see how anybody in this room having heard the evidence that they heard could say that in Mr. Payton's case that's the case. It is just not the case. No witnesses were offered to show that that wasn't a sincere belief.

We put on eight or nine or ten, all of whom agreed; the evidence indicates it is; the best evidence of his sincerity is what he's done since he reached the jail. Not his expressed views or the testimony of the other inmates. He's done a lot of things -- and I'll cover that in a minute -- which demonstrate by deed that he's sincere.

One last thing I didn't agree with, and that is the final or the applicability of the final criterion, "k." I want to talk about that in a minute when I get to that.

I think if you take a look at this chart that I've prepared, it will suggest an approach, and that's what I really want it for, that I suggest you use in analyzing the evidence and in trying to apply the law of these eleven factors to the evidence that's been presented.

Let me go through with this first in general, suggest the approach, and then show you where the prosecutor

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and I agree and disagree and how I think you ought to resolve these issues.

First I listed the factors, and I did not spell them out. That's why I want to read them to you as we go through them. I just gave you sort of a paraphrase or a thumbnail version of what each factor entailed.

And then the next column was "applicable" which is a question mark. You first have to look at the factor that's being discussed and decide in your own mind whether that factor is applicable to the facts of our case.

On most of these, you'll see as I go through it the prosecutor and I agree.

If you decide that a factor is not applicable, then just forget the rest. It has no bearing on the case. It just was designed or intended to apply to some other kind of factual situation.

If you decide that it is applicable, then you have to ask yourself whether that factor is mitigating or whether it's aggravating. And if so, what weight is that factor entitled to?

I want to go through the ones that are applicable with you on this in a minute.

The first criterion or the first factor that you're required to consider -- and I'll read it to you, but I disagree to the circumstances -- is described as the circumstances of the crime of which the defendant was convicted

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in the present proceeding and the existence of any special circumstance or circumstances found to be true.

The question is not whether it's applicable. It's obviously applicable. In every case of special circumstances you're not

only entitled to but you're in essence required to consider the facts of the case. They are obviously relevant.

The question is: Is it aggravating, is it mitigating, and what weight should be given to it.

Now, you may find it hard to believe that I could put a question under aggravating or mitigating. The problem, here we're not using a layman's definition. The facts are not only aggravating in that sense. That they upset us, they are nauseating in part. That's not the definition. That's not the purpose. It's not why you ask that question, and it's not how you answer it.

(Continued on page 2139; nothing omitted.)

[2139]

The question means whether it's aggravating, whether or not the facts of this case set it apart from another first degree murder during the commission of a rape, to distinguish this in terms of the penalty that ought to be imposed. So we're not doing it in a vacuum.

Now, you have a different perspective than probably everyone else in this room. Each one of you does individually because you know from your own past and your own exposure to the press and other cases, some facts about some other cases.

You don't know and probably you're not in a very good position to determine whether this is more aggravated than one that might be tried down the hall or downstairs or somewhere else. The question is not whether the facts are aggravating in a personal sense, but how aggravating is this. Is it really set apart from any other first degree murder committed during the commission of rape or attempt to commit rape.

I think if you think back on all the cases we're all familiar with --

Mr. Jacobs: I think I have to object, your Honor. That's not the law.

Mr. Merwin: That is the law.

Mr. Jacobs: It's not.

The Court: Again, I will admonish the jury this is an argument by counsel. You heard the evidence. You will

[2140]

be instructed on the law. I think that will take care of it, ladies and gentlemen, so with that admonition, you may continue.

Mr. Merwin: Let's think about that and see if that objection makes any sense.

It doesn't make any sense it's just aggravated compared to petty theft or aggravated compared to a rape which is not involved in a murder, or is this aggravated compared to a murder that is not committed during the commission of a rape?

The only question that makes any sense and the reason that question is there, is it aggravated compared to another first degree murder committed during the commission of a rape or attempt to commit rape. That's the context and how you judge the facts and whether you find them in that setting to be aggravated, I'm not trying to tell you. Maybe you will. I know they are offensive. We've all sat and listened to it and I think if you remember Mr. Payton asked for a recess during the testimony of the autopsy surgeon.

Mr. Jacobs: Your Honor, that's not in evidence.

Mr. Merwin: It's offensive to us all.

Mr. Jacobs: I'll object. That is not in evidence. That's improper argument.

The Court: Again, ladies and gentlemen, I will admonish you, as I said, at this particular time is the reason I admonish you, ladies and gentlemen. As I said, statements of counsel

[2141]

are not in any way evidence and you ladies and gentlemen will recall the evidence, I'm sure, better than the attorneys or the Court. You've heard it all and, as I said -- so again, you rely on

your own recollection as to what the evidence is and discard the comments of counsel. It is not evidence.

And with that admonition, as I say, you may proceed Mr. Merwin.

Mr. Merwin: Thank you.

Second factor is defined as follows, the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

There is evidence of that in this case. That's why I said that's applicable and that's something you have to weigh and you have to decide whether or not that other evidence taken in the big picture is an aggravating or mitigating circumstance.

For example, let's talk about the stabbing of Patty Stone in the middle of the night.

On the one hand it's obviously aggravating. It's a violent assault on someone else under circumstances somewhat similar to the instant case, or the case we're dealing with. But on the other hand, I think it illustrates the point that I was trying to make at the end of the penalty phase, and that is that this had to be a mindless, thoughtless, although equally senseless crime.

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The prosecution's response, if you recall, is no, he was there to rape and then he wanted to kill the victim. That obviously doesn't apply if you analyze or try to analyze or compare the two cases.

Think about Stone. There was no attempt to commit rape. That wasn't for the purpose of rape. It wasn't for any sexual purpose, that was explained. It wasn't for any purpose.

Exactly our position on the underlying case is the position I think that is amply demonstrated by the Stone killing -- the Stone stabbing, I'm sorry, and that is it was senseless, obviously. It was followed or preceded by some kind of a break. We don't have evidence to establish what kind or what kind of

psychiatric problem generated that stabbing, but it's the only reasonable explanation of the evidence.

So whether or not you consider the Stone case or the Stone incident an aggravating or mitigating circumstance I think is arguable. I think it does put the current case in a different light or it puts it in an aggravating light or mitigating light I leave it to your judgment, but it's not at all obvious, although Mr. -- or the prosecutor would certainly like you to believe that. It's not obvious to me.

Third one is presence or absence of felony convictions. I put it's applicable because we have evidence

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of two prior felony convictions, but whether or not that is mitigating or aggravating, I submit, is not at all obvious.

The reason for that is neither one is a violent crime. One of them is consensual, unlawful sex with someone under the age of 18. That is not a violent crime. That is not even something directly related to the type of case we're talking about.

The other felony conviction is for possession for more than three ounces of marijuana; hardly an aggravating circumstance in either case. Maybe applicable, but I don't think it is aggravating, or if it is aggravating, if that's your judgment, it's entitled to about zero or nil weight in the kind of decision you are making now.

The next category is the one where I agree with Mr. Jacobs, is whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

I think we could perhaps speculate that was the situation because the acts were irrational. I agree that factor is inapplicable. Therefore, having reached that, you don't need to weigh it. You don't need to decide whether a nonexisting fact or factor is applicable -- pardon me, entitled to much weight at all. It's just not involved in the case.

The next criterion, which is "e," is whether or not the offense was committed under circumstances which

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the defendant reasonably believed to be a moral justification or extenuation for his conduct.

I agree with the prosecutor on that, that was not applicable.

The next one is -- I've gotten one out of order here -- "e," whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. That is obviously not applicable. That was designed for the situation where you are playing Russian roulette or where someone is perhaps very sick, critically ill and asks to be killed, and that's the kind of case that it was designed for. It's just not applicable to ours. And we agree, on that.

The next is whether or not the defendant acted under extreme duress or under substantial domination of another person. This is more the situation where a husband forces a wife that he's been beating for years into killing a child or something of that nature.

(Continued on page 2145; nothing omitted.)

[2145]

Just don't apply to the facts of our case. So you don't need to worry whether it's aggravating or mitigating or what weight is it entitled to.

The next is whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defects or the effects of intoxication.

Now, the psychiatric testimony -- psychiatric testimony was not presented. So there's no direct evidence on that. There's

considerable circumstantial evidence on that. And I don't see how anybody can reach the conclusion that this stabbing death was a result of anything other than (snapping fingers) some kind of a psychiatric disorder that manifested itself under pressure at the time.

I don't think you need a psychiatrist to come in and tell you that and explain his credentials and tell you about psychiatry to draw the obvious inference, and that's that due to some psychiatric problem or some defect, Mr. Payton –

Mr. Jacobs: Well, excuse me. I have to object to this because there's no evidence whatsoever.

Mr. Merwin: There is evidence of it.

Mr. Jacobs: Of psychiatric testimony. Speaking hypothetically; it's the same thing.

Mr. Merwin: I don't think you have to present direct

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psychiatric testimony to argue the relevance of the facts.

The Court: Ladies and gentlemen, again, as I said, this is a situation where I'm going to have you rely on your own recollection of the evidence. You heard all of the testimony in both the guilt and at the penalty phase.

And as I said, it's my position and argument that it is just argument. And for us to try and recall between the attorneys and the Court what was said and what was not said would probably end up that all three of us would be in error. So you have 12 of you who will be in the jury room, and you'll recall the evidence. You can evaluate it.

If there's any question in your mind, as I said, you have a right to come in and request that any testimony be read back if you aren't clear on what the testimony was.

So again, with that admonition, I want to again advise you and admonish you, as I said, that this is argument and these gentlemen would not intentionally misstate the evidence.

But oftentimes, as I said, they may be in error. And I'm not going to evaluate who may or may not be in error here. They may both be right.

But as I said, rely on your own recollection. And if you have any question, as I said, you can come back and we'll read any testimony back you feel you may need.

So again, with that admonition, you may continue, Mr. Merwin.

[2147]

Mr. Merwin: Thank you. I think one way to approach this particular issue is to ask yourself whether or not the acts involved in the Pensinger home and the acts involved with Mrs. Stone are the acts of a rational person or a sane person.

Do you need a psychiatrist to take the stand and tell you they are not?

Certainly, the Stone case, I think illustrates even better than the current one the irrationality of the acts: asleep in bed, having had sex, she's awakened, she's threatened with a knife, she says, "come on, cut it out," or, "get out of here," something like that; and for no reason at all, no reason at all is stabbed.

Then something happens. Police are called. Mr. Payton renders first aid. Hardly the act of someone who is not under some kind of mental disorder resulting from some kind of diminished capacity.

Seems to me it's hard to rationalize the facts to any other conclusion.

Referring now to "g," the specific factor set out in the law is whether or not the defendant acted under the extreme duress or under substantial domination of another

We talked about that. That's obviously not applicable.

"I," the age of the defendant at the time of the crime. That is applicable. We know from the evidence that

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he was 26. We know from that stipulation if you -- if you go backwards, he was 26.

Mr. Jacobs: I think we said 28.

The Court: Obviously a good time for me to indicate, as I said, as I said, I believe the stipulation was 28. This is, as I said, again admonish you not to rely on these gentlemen's argument. So with that comment, I think 28 was the stipulation.

Mr. Merwin: The stipulation was he is 28. The factor calls for the age of the defendant at the time of the crime.

The Court: You're correct. See, now we're both wrong. You may continue.

Mr. Merwin: So if you go backwards in time, that puts him at 26 or 27. We don't have the exact date of birth because that wasn't included in the stipulation. But we're talking about someone who, by virtue of age, is immature. We're not talking about someone who is in his 40's or 50's who has demonstrated by a long list of convictions or a long list of other incidents that he's mature or that he has established himself as someone not deserving of our continued concern.

We're talking about a 26-year-old immature man. I think the age here is important, not just for that point, but also because that leaves him the rest of his productive life in prison, potentially, ahead of him. Potentially,

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if that's the verdict of this jury, that's a lot of years of potentially productive existence.

So I think age is a factor, and I think it's an important factor.

When we were talking about these factors in individual jury selection, we commented at some length about how you go about analyzing them. You don't count them up. You weigh them against each other. You can give age any weight you think

it's entitled to. You could give it zero weight or you could say that that's the most important factor on that board. That's up to each of you individually to decide.

Next one, "j," is whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

Here again, Mr. Jacobs and I agreed on this. It's just not applicable. That's designed for a case where there's more than one defendant.

Finally, here's one we disagree on rather strenuously. And that's the last one, which is "k," which is any other circumstance which extenuates the gravity of the crime even though it's not a legal excuse for the crime.

Mr. Jacobs tells you that's not applicable. If that's not applicable and that therefore all the evidence we presented is not applicable, why didn't we hear any objections to its relevance?

[2150]

Mr. Jacobs: Well, that's not a proper thing to say either because we'd be outside the presence of the jury.

(Continued on page 2151; nothing omitted.)

[2151]

The Court: Yes. As I said, I'm not going to repeat the admonition, but, as I said, you may continue, Mr. Merwin.

Mr. Merwin: The whole purpose for the second phase or trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to that.

This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phase [sic]. It was designed to include, not exclude, that kind of evidence.

Any jury that wanted -- that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.

I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of all the factors and I want to go through some of the reasons for that with you.

I think the evidence that was presented showed a number of extenuating or mitigating circumstances that fall into the general category of extenuating circumstances that cannot rise to the level of an excuse or defense to the crime and that is what we were presenting.

For instance, the evidence showed that Mr. Payton's

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bright. He authored, has authored an autobiography. He's taken a course in calculus. He's been accepted to a Bible -- correspondence Bible college. It also shows he has tremendous leadership potential that not only was recognized by his pastor who knew him but when he was 16, 17 and 18, but has demonstrated by his conduct in the jail. He has apparently on his own set up some of these programs that resulted in Bible studies and even has assisted other inmates in resolving their own problems regarding their own faith.

He is talented and I submit there's a section of the literature that was presented, and whether or not you choose to interpret the frolicking seals as an indication of callousness or as an indication of talent, there's no way to indicate the way it was written and the only basis on which it was authored and accepted.

I think the writing of his experiences in Cam Ranh Bay is also an equal illustration of his talent and his general ability.

I think most important, though, the evidence to me demonstrated that he has found a new productive, forward looking purpose for his life, and he plans to devote his life to that, namely, the prison ministry.

The way this was treated by Mr. Jacobs was so flippant I couldn't believe it.

Let's think about it. The first reaction it might be all right, whenever the door is slammed shut, you get

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religion. That may be true with some people, so judge for yourself the sincerity of Mr. Payton. Judge for yourself the sincerity of the witnesses who took the stand and said no, I know he's sincere.

You heard his mother. I think it was hard to believe she was insincere when she told you she knew he was sincere. You heard about all the hours he spent with other inmates trying to help them resolve their own problems dealing with their faiths.

That doesn't sound like insincerity on my part, or it doesn't sound like that to me.

You could ask Keith Dandley who was one of the witnesses whether he thinks he was sincere. He testified under oath he saved his life. He talked him out of suicide by redirecting his life, by affecting his faith. Now, that's someone who knows better. To him it's not a joke. It's not something that should be taken lightly or flippantly.

I don't think you got that impression from Barbara Seglie either. She testified as a missions director for a local church who spends hours and hours and hours dealing with Mr. Payton and who plans to continue working with him in the event the sentence here is life without parole.

I don't think she considers her time that valueless or what she is doing that valueless.

Apart from sincerity, which I think is obvious and was never even refuted, not one witness said he felt

[2154]

or she felt he was insincere. The next question seems to me is could Mr. Payton have a productive prison ministry or could he do something valuable for other inmates or for others in prison.

I think the obvious answer there is that he could. He's demonstrated that he could. He's not just talking about it. We're not just putting on people to say well, gee, I have found religion, therefore, give me a break.

What he's doing with his deeds is demonstrating that he can play a productive role in a lifetime prison setting.

One example, again, is Keith Dandley. How many lives could he save in the course of the next 40 or 50 years while he's in prison. He's already saved the one and I'm not talking about spiritual saving. That's another, aspect to be considered.

But just in terms of talking Keith Dandley out of committing suicide, I think he's done a tremendous service and demonstrated his value to all of us.

We know that he's helped in terms of keeping the lid on or keeping violence down in the jail. Deputy Engen, I think I may be mispronouncing his name, was clear on that. He said he was glad to have him in his mod and the reason was he not only was able to help calm down other inmates which, of course, is becoming increasingly difficult for the system to cope with, but he would bring to the deputy

[2155]

sheriff's attention problems before they actually developed so they could be resolved and resolved without violence. That obviously has an advantage to all of us and that's a role he could and has demonstrated he would play if the sentence was life without possibility of parole.

I think when you decide what value ought to be placed on what Mr. Payton could do within a prison setting for the rest of his life, you have to think of first his value to other inmates by

helping keep the lid on or calm his fellow inmates. He prevents violence. By writing, he might brighten someone's life.

(Continued on page 2156; nothing omitted.)

[2156]

By communicating his faith and his feelings to others, he may help someone else spiritually. And those people may get out of prison some day, and those people may influence others.

I think there are a lot of good reasons to keep Bill Payton alive, an awful lot of good reasons. And that's exactly what I think " k" is talking about.

Are there good reasons for you folks to vote to keep Bill Payton alive, and I submit there are.

One last observation. And that's that I trust that none of you (sic) when you go into that room will demonstrate your own personal respect for human life by deliberately destroying it.

Thank you.

The Court: Ladies and gentlemen, with regard to the instructions the Court's about to give you, want to indicate to you that you've previously been instructed, and the instructions I previously gave will be given to you again in the jury room to use if applicable in the penalty phase of this trial.

However, I want to indicate to you that the fact that a few of the instructions may be given twice you're to draw no inference that they are intended to be given more weight than any other instruction.

So with that general statement, every person who testifies under oath or affirmation as a witness, you are

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the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of a witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or non-existence of a bias, interest, or other motive;

Evidence of the existence or non-existence of any fact testified to by the witness;

The attitude of the witness towards the action in which testimony has been given by the witness or toward the giving of testimony;

A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness;

The witness's prior conviction of a felony.

Testimony which you believe given by one witness

[2158]

is sufficient to prove for the proof of any facts. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of a single witness, you should carefully review all of the testimony upon which the proof of such fact depends.

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference from the fact that he has not testified. Further, you must neither discuss this matter or permit it to enter into your deliberations in any way.

As pertaining to the evidence of other crimes not charged at this trial, but introduced at the penalty stage, the following is applicable:

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.

As to evidence of other crimes committed by the defendant not charged in this case, such offenses before they can be considered must be proven to you beyond a reasonable doubt, as has previously been defined to you.

In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has

[2159]

been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:

(a), The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(b), The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

Presence or absence of any prior felony conviction.

Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

Whether or not the offense was committed under circumstances which defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g), Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h), Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality

[2160]

of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication.

(i), The age of the defendant at the time of the crime.

(j), Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k), Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been found to be true. It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged in this case has been found to be true.

Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.

It is now your duty to determine which of the two penalties, death or confinement in the state prison without possibility of parole, shall be imposed on the defendant.

[2161]

After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

(Continued on page 2162; nothing omitted.)

[2162]

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

You shall now retire and select one of your numbers to act as foreman who will preside over your deliberations.

In other words, to make a determination to the penalty, all 12 jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then shall return it to this courtroom.

The clerk will now swear the bailiff to take charge of the jurors with the exception of the two alternates.

(Clerk swears the bailiff.)

The Clerk: Would you state your name for the record.

The Bailiff: Kevin Laughlin, L-A-U-G-H-L-I-N.

The Court: All right, Mr. Bailiff.

(Jurors exited the courtroom.)

(The following proceedings had in open court:)

The Court: The clerk will swear the bailiff to take charge of the alternates.

(Clerk swears the bailiff.)

(4)

Supreme Court, U.S.
FILED
AUG 6 - 2004
OFFICE OF THE CLERK

No. 03-1039

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MELISSA A. MANDEL
Deputy Attorney General
A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Fax: (619) 645-2191
Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The evidence at issue in *Boyde* was pre-crime evidence in mitigation. Relying on *Boyde*, the California Supreme Court held that California's "catch-all" mitigation instruction in this capital case is constitutional as applied to post-crime evidence in mitigation. In a six-to-five decision, the en banc Ninth Circuit held that the California Supreme Court decision was objectively unreasonable "because *Boyde* does not control this case." The question presented is:

Did the Ninth Circuit violate 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1039

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

Jill L. Brown, Acting Warden, California State Prison at San Quentin (hereinafter State) respectfully submits Petitioner's Brief on the Merits.

OPINIONS BELOW

The opinion of the Ninth Circuit (en banc) following remand by this Court is reported at *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). Pet. App. ("P.A.") at 1-44. This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported at *Woodford v. Payton*, 538 U.S. 975 (2003). P.A. at 45. The opinion of the Ninth Circuit (en banc) preceding remand by this Court is reported at *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002). P.A. at 46-86. The opinion of the Ninth Circuit (panel) is reported at *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001). P.A. at 87-129. The order of the district court is unreported. P.A. at 130-38.

The opinion of the Supreme Court of California is reported at *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1992). P.A. at 139-86.

STATEMENT OF JURISDICTION

An en banc panel of the Ninth Circuit entered judgment granting habeas corpus relief as to the death penalty on October 20, 2003. The State filed a Petition for Writ of Certiorari on January 15, 2004, and the Court granted the Petition on May 24, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

California Penal Code section 190.3, which provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

P.A. at 188-89.

STATEMENT OF THE CASE

Payton's Rape And Murder And Two Attempted Murders

In the early hours of May 26, 1980, Respondent William Charles Payton went to the home of Patricia Pensinger in Garden Grove, California, where he had once been a boarder. After receiving permission from Patricia to sleep on her couch, Payton entered the room of one of Patricia's borders, Pamela Montgomery, and raped and stabbed her to death. P.A. at 141-42.

After cleaning himself off in the bathroom, Payton entered Patricia's bedroom while she and her ten year old son, Blaine, slept. Payton inflicted forty stabs wounds to Patricia's face, neck, back and chest. He inflicted twenty-three stabs wounds to Blaine's face, neck and back. Both survived. P.A. at 141-42. A state court jury found Payton guilty of first-degree murder, rape and two counts of attempted murder. The jury further found true the special circumstance of murder in the commission or attempted commission of rape and the personal knife use enhancement. P.A. at 140.

The Consideration And Imposition Of The Death Penalty

The California Capital Sentencing Scheme

In California, a defendant is eligible for the death penalty when the trier of fact finds him guilty of first-degree murder and finds one of the special circumstances true. *Tuilaepa v. California*, 512 U.S. 967, 975 (1994). Following that determination, a defendant's case proceeds to a penalty phase where the trier of fact determines whether to impose death or life imprisonment without the possibility of parole. Cal. Penal Code § 190.3; P.A. at 187-90. At the time of Payton's penalty trial, the standard jury instructions, also given to Payton's jury, identified eleven factors to be considered by the trier of fact in

deciding the appropriate penalty. Specifically, the instruction provided:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

> (i) The age of the defendant at the time of the crime.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Cal. Jury Instructions, Criminal, No. 8.84.1 (4th ed. 1979) ("CALJIC"); J.A. at 94-95.

The factors were taken verbatim from California Penal Code section 190.3 and many of the listed factors could serve as either aggravating or mitigating circumstances, depending on what the trier of fact found. *See Tuilaepa,* 512 U.S at 978-79. The eleventh factor, (k), is known as the "catch-all" mitigation instruction.[1/] *Boyde v. California*, 494 U.S. at 373-74.

Payton's Penalty Trial And Verdict

At the penalty phase, the prosecutor introduced evidence of a prior incident in which Payton stabbed a former girlfriend in the chest and arms after waking her, as well as Payton's jail house conversations in which he said he had "a severe problem with sex and women" and "that all women on the street that he had seen was [sic] a potential victim, regardless of age or looks." J.A. at 5-19, 12. In mitigation, Payton's defense presented solely post-crime character evidence consisting of eight witnesses who testified that he had made a sincere commitment to God while in prison, was remorseful, had a calming effect on other prisoners, and could help others while in prison through Bible study classes and a prison ministry. J.A. at 15-26, 27, 33-34, 36-54.

---

1. CALJIC No. 8.84.1 has been amended at various times and the factor (k) instruction is no longer phrased as it was when Payton was sentenced.

During closing argument, both the prosecutor and Payton's defense counsel discussed the "catch-all" mitigation evidence instruction, factor (k). The prosecutor initially argued incorrectly that the instruction "doesn't refer to anything after the fact or later." Defense counsel objected and moved for mistrial. J.A. at 68. The trial judge denied the mistrial motion but admonished the jury, "again, I want to emphasize to you that the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." J.A. at 69-70. The prosecutor at first repeated his erroneous interpretation of factor (k), without objection, before discussing, at length, the weight of the evidence in aggravation and Payton's post-crime evidence in mitigation. J.A. at 70-76. The prosecutor concluded:

> Is this the type of defendant for whom we should listen to pleas for mercy?
>
> [Defense counsel] will tell you this is a defendant who can be rehabilitated because he's a good Christian and he helps the module deputy.
>
> In 1973, he stabbed Mrs. Stone [Payton's former girlfriend]. In 1976, he was convicted of two felony convictions. In 1981, he rapes and murders a girl and tries to kill two other people. You think he is going to be rehabilitated?
>
> The law in its simplicity is that . . . if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty.
>
> How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, . . . Blane [sic] Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old.

J.A. at 75-76.

Defense counsel argued to the jury that the factor (k) instruction was a catch-all instruction designed to include the kind of evidence that Payton presented. He explained:

> The whole purpose for the second phase or trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to that.
>
> This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phase [sic]. It was designed to include, not exclude, that kind of evidence.
>
> Any juror that wanted -- that was in the position of trying to determine the fairest possible sentences, select them between death or life without the possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.
>
> I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of all the factors.

J.A. at 88-89. After reviewing Payton's achievements while in prison, J.A. at 89-92, defense counsel concluded, "I think there are a lot of good reasons to keep Bill Payton alive, an awful lot of good reasons. And that's exactly what I think "k" is talking about." J.A. at 92.

The trial court instructed the jury pursuant to the standard jury instructions, including the direction to consider all of the evidence and the catch-all instruction. J.A. at 92-95. The trial court then concluded:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

J.A. at 95-96.

The jury returned a verdict of death. The trial court denied Payton's motion to modify the verdict and sentenced Payton to death for the murder of Pamela Montgomery and to twenty-one years and eight months in state prison for the rape of Pamela Montgomery and the attempted murders of Patricia and Blaine Pensinger. P.A. at 140.

This Court's Decision In *Boyde v. California*

While Payton's direct appeal was pending, this Court issued its opinion in *Boyde*. The Court held that the "catch-all" mitigation instruction directing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," the same one used in Payton's case, satisfied the Eighth Amendment requirement that the sentencer be permitted to consider and give effect to all relevant mitigating evidence in determining whether to impose a death sentence. *Boyde*, 494 U.S. at 377-82.[2] In reaching that conclusion, the Court rejected Boyde's argument that the "catch-all" mitigation instruction limited the jury's consideration to "any other circumstance *of the crime* which extenuates the gravity of the crime." *Boyde*, 494 U.S. at 382 (emphasis in original, internal quotation marks omitted). Rather, the Court concluded that the "jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Id.* (emphasis in original).

The Court in *Boyde* further held that "[e]ven were the language of the [catch-all] instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and

2. The trial court in *Boyde* also provided the jury with a definition of "extenuates," namely "to lessen the seriousness of the crime as by giving an excuse." *Boyde*, 494 U.S. at 381. The definition, however, was not the basis for the decision.

character could be considered in mitigation." *Boyde*, 494 U.S. at 383. Examining the other instructions given to the jury, the Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime-related* evidence [in mitigation]." *Id.* at 383 (emphasis added).

Additionally, because the entirety of Boyde's evidence at the penalty phase related to his background and character and was introduced without objection, the Court found it "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.'" *Boyde*, 494 U.S. at 383-84 (citation omitted). Finally, in response to Boyde's claim the prosecutor's argument reinforced an improper interpretation of factor (k), the Court observed that arguments by prosecutors regarding the relevance of mitigating evidence "carry less weight with a jury than do instructions from the court," and that they are not, therefore, "to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85.

Direct Appeal To The California Supreme Court

On automatic appeal to the California Supreme Court, Payton argued that his penalty-phase jury was unconstitutionally precluded from considering his mitigation evidence in determining whether he should receive a sentence of life or death. He maintained that the trial court's instructions were inadequate to counter the prosecutor's misstatement of law advising the jury that it could only consider circumstances related to the crime. In a five-to-two decision, the California Supreme Court rejected his claims and affirmed Payton's convictions and sentence of death.

The California Supreme Court recognized that "[t]he Eighth Amendment, of course, requires that the sentencer be

permitted to consider [background and character] evidence." P.A. at 160 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982), *Lockett v. Ohio*, 438 U.S. 586, 602-09 (1978) and *Skipper v. South Carolina*, 476 U.S. 1, 4-9 (1986) (regarding good behavior in prison)). The California Supreme Court held there was no Eighth Amendment violation because there was no reasonable likelihood that Payton's jury understood the court's instructions as precluding consideration of his evidence in mitigation. P.A. at 140, 162, 164.

In so holding, the California Supreme Court focused on this Court's decision in *Boyde*, which expressly cited and incorporated the Eighth Amendment principles in *Eddings*, *Lockett* and *Skipper* (as well as *Penry v. Lynaugh*, 492 U.S. 302 (1989)), and applied them to factor (k). The California Supreme Court noted that Payton's jury was instructed with the same "catch-all" mitigation instruction that this Court found constitutional in *Boyde*, and that this Court's decision in *Boyde* rejected many of the precise arguments made by Payton. P.A. at 160-62. Thus, citing *Boyde*, the California Supreme Court held that, although the trial court "did not embellish the language of factor (k), that fact standing alone does not support a claim of error." P.A. at 164.

Additionally, recognizing that "the high court's holding in *Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k)," the California Supreme Court evaluated whether there was a reasonable likelihood the jury misunderstood factor (k) "in the context of the proceedings." P.A. at 161. The California Supreme Court found the prosecutor had incorrectly argued the meaning of factor (k). However, applying *Boyde*, the court noted that arguments of counsel do not carry the same force as the trial court's instructions on the law. Further, the court found that "[a]ny impact this argument may have had . . . was immediately blunted by defense counsel's objection" and the trial court's admonition. P.A. at 162. The court also found the prosecutor properly suggested how the jury

might weigh Payton's mitigating evidence against the evidence in aggravation and thereby implicitly recognized that the jury could and would consider the defense evidence. Thereafter, defense counsel's closing argument reinforced the correct interpretation of factor (k). P.A. at 164. Lastly, the California Supreme Court, like the Court in *Boyde*, found it unlikely that reasonable jurors would believe the court's instructions precluded them from considering the only evidence offered in mitigation. P.A. at 163. Accordingly, the California Supreme Court held that neither the instruction nor the context of the proceedings was reasonably likely to mislead Payton's jury into believing it could not consider Payton's post-crime character evidence in mitigation in determining his sentence. P.A. at 161-64. This Court subsequently denied Payton's petition for certiorari. *Payton v. California*, 510 U.S. 1040 (1994).

De Novo Federal Habeas Corpus Review

On May 6, 1996, Payton filed his first petition for a writ of habeas corpus in the United States District Court for the Central District of California. Although his petition was filed after the effective date of AEDPA, the district court (and later the Ninth Circuit panel and the initial en banc panel of the Ninth Circuit) reviewed Payton's claims *de novo*.

The district court granted the petition as to the penalty phase on the grounds of prosecutorial misconduct. The district court held that the prosecutor's incorrect factor (k) argument so infected the penalty trial as to deny Payton a fair trial. P.A. at 131, 138. On appeal to the Ninth Circuit, a divided panel reversed the grant of habeas relief, holding that the prosecutor's incorrect argument did not so infect the penalty trial as to preclude consideration of Payton's mitigation evidence. P.A. at 98-107. The Ninth Circuit granted Payton's petition for rehearing en banc.

In a six-to-five opinion, an en banc panel of the Ninth Circuit affirmed the district court's grant of habeas relief as to

the penalty phase. P.A. at 71. Applying *de novo* review, the majority found:

> *Boyde* did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which more readily fits within factor (k).

P.A. at 60 (Paez, J., joined by Schroeder, C.J., Pregerson, J., Tashima, J., W. Fletcher, J., and Berzon, J.) (internal quotation, footnote and citation omitted).

According to the majority opinion:

> Most naturally read, the phrase "extenuates the gravity of the crime" refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.

P.A. at 59. The majority ruled that, "[u]nlike the pre-crime evidence in *Boyde*, post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned factor (k) instruction. Mitigation evidence occurring after the crime cannot possibly 'extenuate the gravity of the crime.'" P.A. at 60-61. Therefore, the majority concluded, "[b]ecause the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper*'s requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty." P.A. at 61. Accordingly, the majority held, "[s]tanding alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." P.A. at 61.

The majority further held that, because there was "an absence of instruction" directing the jury to consider Payton's post-crime evidence in mitigation, the prosecutor's incorrect argument concerning factor (k) constituted the instructions to the jury. As such, there was a reasonable likelihood the jury understood the instructions as precluding consideration of

Payton's mitigation evidence. P.A. at 62-66. The majority then imposed an affirmative duty on the state trial court to instruct Payton's jury "that it must take his post-crime [mitigation] evidence into account in determining whether to impose a sentence of life or death." P.A. at 71.

The dissent, also applying the higher *de novo* standard of review, concluded that *Boyde*'s holding – that the "catch-all" mitigation instruction was constitutionally adequate – applied equally to Payton's case. P.A. at 72 (Tallman, J., joined by Kozinski, J., Trott, J., Fernandez, J., and T.G. Nelson, J.). Like the California Supreme Court majority, the dissent noted *Boyde*'s conclusion that factor (k) permitted consideration of "any other circumstance," not just circumstances related to the crime. P.A. at 76-77. Further, the dissent reasoned, "as both the Supreme Court in *Boyde* and our court's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what defense counsel tried to show during the penalty phase – that Payton had undergone a character transformation after being jailed." P.A. at 78. The dissent concluded: "there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k)." P.A. at 78.

The dissent also found that "the context of the proceedings" further bolstered its conclusion that there was no reasonable likelihood the jury understood the instructions to preclude consideration of Payton's mitigation evidence. Like the California Supreme Court, the dissent relied upon *Boyde*'s principles that arguments of counsel carry less weight, a jury is not likely to disregard the only evidence presented, and that other instructions told the jury to consider all of the evidence. P.A. at 78-83.

Federal Habeas Corpus Review Under AEDPA

Pursuant to *Woodford v. Garceau*, 538 U.S. 202 (2003), the Court granted the State's petition for a writ of certiorari and remanded this case to the Ninth Circuit to reconsider its decision under the principles of AEDPA. P.A. at 45.

By the identical six-to-five vote, the same en banc panel of the Ninth Circuit again affirmed the district court's grant of habeas relief as to the penalty phase on the ground that California's "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation and that it was reasonably likely that Payton's jury understood the court's instructions as precluding consideration of Payton's post-crime character evidence in mitigation.

Writing for the majority, Judge Paez acknowledged the California Supreme Court's correct recitation of clearly established law, namely, that the Eighth Amendment requires the sentencer in a capital case to consider and give effect to all relevant mitigation evidence offered by the defendant. P.A. at 14-15. However, the majority found that the California Supreme Court unreasonably applied this precedent because, in analyzing Payton's claim, the California Supreme Court "focused entirely on the United States Supreme Court's decision in *Boyde*," which "does not control this case." P.A. at 15. "[I]n focusing almost exclusively on *Boyde*," explained the majority, "the court did not give proper effect to . . . *Skipper* and *Penry* that are controlling here." P.A. at 15. The majority then reiterated its reasoning that *Boyde*'s decision to uphold the constitutionality of the "catch-all" mitigation instruction turned on the pre-crime nature of Boyde's character and background evidence because such evidence related to the crime by providing an "excuse" for the crime. P.A. at 15. In contrast, found the majority, Payton's post-crime character evidence "cannot possibly 'extenuate the gravity of the crime.'" P.A. at 17.

The majority also found that the California Supreme Court was objectively unreasonable in finding the "context of the proceedings" did not mislead the jury concerning its ability to consider Payton's mitigation evidence. The majority found wholly inapplicable *Boyde*'s principles that arguments of counsel carry less weight, that a jury is not likely to disregard the only evidence presented, and that the other instructions told the jury to consider all of the evidence. P.A. at 16-17. The majority concluded that because the prosecutor in Payton's trial misstated the law and Payton's mitigation evidence was post-crime, the California Supreme Court was objectively unreasonable in applying *Boyde*'s principles to Payton's case. P.A. at 20-25. Consequently, the majority opinion again held: "Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence [in mitigation] into account in determining whether to impose a sentence of life or death." P.A. at 30.

The dissent began by observing that "[t]oday, six judges of this court announce that the legal conclusion reached by *seven*[3] of their colleagues (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law." P.A. at 31 (emphasis in original). To the contrary, contended the dissent, the "California Supreme Court's application of *Boyde* was not only reasonable but correct." P.A. at 33. The dissent reiterated its position that *Boyde*'s holding concerning the constitutionality of the "catch-all" instruction applied equally to Payton's post-crime evidence in mitigation. P.A. at 33-36. Moreover, the dissent emphasized the limits on federal habeas corpus review imposed by AEDPA:

> Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it

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3. The seven judges of the Ninth Circuit who reviewed Payton's claim of constitutional error *de novo* consist of the five dissenting judges in the initial en banc opinion (Judges Tallman, Kozinski, Trott, Fernandez, and T.G. Nelson) and the two judges of the three-judge panel (Judges Rymer and Gould).

> concerned precrime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigating evidence dichotomy offered by the majority is the majority's own untenable invention–not that of the United States Supreme Court. AEDPA commands that we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to overturn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

P.A. at 41. The dissent similarly found that the California Supreme Court's thorough analysis of the context of the proceedings "faithfully followed the dictates of *Boyde*, the most analogous Supreme Court case." P.A. at 37. In the end, argued the dissent, "[t]he California Supreme Court is just as qualified as we are to distinguish and apply United States Supreme Court precedent. The majority's 'readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" P.A. at 41 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)).

SUMMARY OF ARGUMENT

Last term, the Court remanded this case to the Ninth Circuit with instructions to reevaluate its initial en banc decision under the highly deferential standard for evaluating state court rulings mandated by AEDPA. With no more than a few superficial changes and a passing citation to AEDPA, the Ninth Circuit issued a virtually identical opinion, again affirming the grant of habeas relief. By the same six-to-five vote, the Ninth Circuit held "objectively unreasonable" the legal conclusion of twelve judges – five justices of the California Supreme Court and seven judges of the Ninth Circuit – that, pursuant to *Boyde*, California's "catch-all" mitigation instruction is constitutional

as applied to post-crime evidence in mitigation and that there was no reasonable likelihood Payton's jury understood the court's instructions as precluding his evidence in mitigation.

Both the Ninth Circuit's methodology and its result violate AEDPA's mandate to "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). First, the Ninth Circuit faulted the California Supreme Court for relying upon *Boyde* to decide whether the "catch-all" mitigation instruction impermissibly excluded consideration of Payton's post-crime character evidence, as opposed to *Penry* and *Skipper*. P.A. at 15. However, *Boyde*, not *Penry* or *Skipper*, addressed the constitutionality of California's "catch-all" mitigation instruction. Moreover, the generalized principle articulated in *Penry* and *Skipper*, that the Eighth Amendment requires the sentencer to consider any evidence in mitigation offered by the defendant in determining whether to impose life or death, including future prospects, was also embodied in *Boyde* and expressly recognized by the California Supreme Court. Thus, the California Supreme Court was more than reasonable in relying upon *Boyde* to decide Payton's claim that his jury was unconstitutionally precluded from considering his mitigation evidence.

Second, the Ninth Circuit criticized the California Supreme Court for finding that *Boyde*'s holding that factor (k) "standing alone" satisfied the Eighth Amendment applied equally to Payton's case. P.A. at 15-17. The issue squarely presented and decided in *Boyde* was whether factor (k) allowed for consideration of *non-crime related evidence in mitigation* or limited the jury to other evidence *related to the crime*. *Boyde*, 494 U.S. at 377-78. The Court in *Boyde* held that factor (k) allowed for consideration of *non-crime* related mitigation evidence that extenuated the gravity of the crime, "which certainly includes a defendant's background and character." *Id.* at 382. The California Supreme Court was, therefore, reasonable in concluding that factor (k) allowed for

consideration of Payton's non-crime related evidence in mitigation, particularly as it related to his character – even if that evidence consisted of post-crime acts.

Instead of focusing on the reasonableness of the California Supreme Court's decision, the Ninth Circuit advanced inconsequential factual differences between *Boyde* and *Payton* in order to find *Boyde*'s factor (k) holding inapplicable. The Ninth Circuit found that *Boyde*'s holding that factor (k) allowed for consideration of a defendant's non-crime related evidence in mitigation was limited to cases, like *Boyde*, that involved pre-crime evidence in mitigation such as troubled childhood or emotional or mental problems. Bypassing the plain meaning of the Court's holding in *Boyde*, the Ninth Circuit turned to the Court's explanation for why Boyde's particular evidence was "certainly" included in the directive to consider "any other circumstance that extenuates the gravity of the crime even though it is not a legal excuse." Thus, the Ninth Circuit concluded that Boyde's evidence fell within factor (k) because it provided an excuse *for the commission of the crime*. P.A. at 16-17 n.9.

In so holding, the Ninth Circuit adopted the very argument this Court rejected in *Boyde*: that factor (k) only permitted consideration of circumstances related to the crime as opposed to "any other circumstance" that might justify a sentence less than death. The Ninth Circuit also improperly assumed that, in deciding the appropriate punishment to be imposed upon a capital defendant, society would naturally consider pre-crime evidence of character and background but not post-crime character evidence such as Payton's rehabilitation. P.A. at 15-16. Both concepts, however, are inherent in any sentencing determination and both fall within factor (k). Nevertheless, even assuming the Ninth Circuit were correct, it was at least reasonable for the California Supreme Court to find otherwise given its straightforward application of *Boyde* and the fact that, until the Ninth Circuit's decision in *Payton*, no other cases interpreted *Boyde* in such a fashion.

Finally, the Ninth Circuit found fault with the California Supreme Court's application of *Boyde* in its analysis of factor (k) "in the context of the proceedings." Again, instead of focusing on the reasonableness of the California Supreme Court's decision, the Ninth Circuit focused on factual differences immaterial to the analysis and refused to apply any of *Boyde*'s principles to *Payton*. Thus, because a portion of the prosecutor's argument in *Payton* misstated the meaning of factor (k), the Ninth Circuit found wholly inapplicable *Boyde*'s principles that arguments generally do not carry the same force as instructions, that correct arguments by the defense may be considered or that a jury is not likely to disregard the only evidence presented. P.A. at 17, 20, n.13 & n.14. Additionally, the Ninth Circuit wholly disregarded the Court's finding in *Boyde* that the other instructions made it even more improbable a jury would misconstrue factor (k). P.A. at 22-23. However, *Boyde* and the principles articulated therein governed precisely the claim and situation in *Payton* and the California Supreme Court reasonably applied *Boyde* in affirming the judgment. Because the Ninth Circuit did not give deference under AEDPA to the California Supreme Court's reasonable decision but instead improperly substituted its own judgment, its decision should be reversed.

ARGUMENT

THE EN BANC NINTH CIRCUIT FAILED TO ADHERE TO THE LIMITS CONGRESS IMPOSED, THROUGH AEDPA, ON FEDERAL HABEAS CORPUS REVIEW AND ITS DECISION SHOULD BE REVERSED

Under the requirements of AEDPA, a federal court "shall not" grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 639 (2003). The Ninth Circuit's decision granting habeas relief to Payton turned on its conclusion that the California Supreme Court unreasonably applied clearly established Supreme Court precedent.

A state court decision constitutes an "unreasonable application" of this Court's precedent if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). It is now well settled that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Id.* at 75.

This "highly deferential standard for evaluating state court rulings" demands that federal courts give state court decisions "the benefit of the doubt." *Visciotti*, 537 U.S. at 24; *Williams v. Taylor*, 529 U.S. 362, 404-13 (2000). In that regard, AEDPA profoundly modified the role of federal habeas courts to, inter alia, "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. at 693.

Although the Ninth Circuit en banc majority cited this precedent and labeled the California Supreme Court's decision "objectively unreasonable," its analysis demonstrates it did not adhere to the requirements of AEDPA but instead, again, substituted its own judgment. As noted by the dissent, even if the California Supreme Court were incorrect it was surely not "objectively unreasonable." P.A. at 41. Indeed, a review of the Ninth Circuit's reasoning shows that, not only was the

California Supreme Court reasonable, it was correct. The California Supreme Court properly identified *Boyde* as the controlling authority and reasonably applied *Boyde* in finding factor (k), on its face and in the context of the proceedings, satisfied the requirements under the Eighth Amendment that a sentencer be permitted to consider and give effect to a defendant's mitigating evidence. Only by utterly disregarding the limits imposed by AEDPA could the Ninth Circuit have affirmed the grant of habeas relief.

A. The California Supreme Court Reasonably Identified And Relied Upon *Boyde* As The Controlling Supreme Court Precedent For Assessing Claims That Factor (k) Failed To Instruct Jurors To Consider A Defendant's Background And Character Evidence

The first basis for the Ninth Circuit's decision that the California Supreme Court was "objectively unreasonable" was the California Supreme Court's focus on *Boyde* when analyzing Payton's claim that his jury was unconstitutionally precluded from considering his post-crime evidence in mitigation. According to the Ninth Circuit, "in focusing almost exclusively on *Boyde*, the court did not give proper effect to clearly established Supreme Court cases such as *Skipper* and *Penry* that are controlling here." P.A. at 15. That criticism is groundless. The California Supreme Court cannot be faulted for focusing on the one decision of this Court that has analyzed whether the specific mitigation instruction at issue in this case, factor (k), comports with the Eighth Amendment.

As this Court recently observed in *Beard v. Banks*, 124 S. Ct. 2504, 2511, 2512 (2004), the "line of cases beginning with *Lockett* . . . and *Eddings*" establish the general rule "that the sentencer must be allowed to consider any mitigating evidence." In *Boyde*, this Court cited *Lockett*, *Eddings*, and *Penry* for that proposition, 494 U.S. at 377-78, and then turned

to the question before it: whether California's capital sentencing system comported with the rule those cases established. California argued that the catch-all mitigation instruction, factor (k), ensured that it did. This Court agreed. The reasoning and holding of *Boyde* was, therefore, simply an application of *Skipper* and *Penry* (as well as *Lockett* and *Eddings*). There is no tension or inconsistency between *Boyde*, on the one hand, and *Skipper* and *Penry*, on the other.

Moreover, as the Ninth Circuit conceded, the California Supreme Court itself "acknowledged the teachings of *Eddings*, *Lockett*, and *Skipper* that the Eighth Amendment requires the sentencer in a capital case to consider evidence of character and background, including 'good behavior in prison.'" P.A. at 14-15. Accordingly, any suggestion by the Ninth Circuit that the California Supreme Court ignored the general principles of *Skipper* and *Penry* is unsupportable.

The only other basis upon which the Ninth Circuit criticized the California Supreme Court for focusing on *Boyde* was the existence of factual differences between this case and *Boyde*. The Ninth Circuit is certainly correct that the character evidence presented in *Boyde* involved pre-crime events, whereas the character evidence presented by Payton involved post-crime events. That factual difference, however, does not make *Boyde* any less relevant. To repeat the obvious, *Boyde* is the one decision of this Court that has addressed the claim that factor (k) failed to allow the jury to consider and give effect to all relevant mitigating evidence. It is plainly the most instructive decision of this Court with respect to that very same claim as applied to a different type of character evidence presented in mitigation. The California Supreme Court was reasonable, to say the least, in focusing on *Boyde*.

B. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, Factor (k) "Standing Alone" Satisfied The Eighth Amendment

The second component of the California Supreme Court's decision that the Ninth Circuit found "objectively unreasonable" was the court's conclusion that, under *Boyde*, factor (k) standing alone instructed the jury to consider Payton's character evidence in mitigation. The California Supreme Court's holding was an eminently reasonable application of *Boyde*. AEDPA requires that it be respected.

1. *Boyde's* Analysis Of Factor (k) "Standing Alone"

The central issue in *Boyde*, as in Payton's case, was whether the "catch-all" mitigation instruction limited the jury to consideration of mitigation evidence directly related to the crime in violation of the Eighth Amendment's requirement that a jury "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78. Boyde argued "[t]hat the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to *non-crime-related mitigation evidence*, because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (emphasis in original and added). This Court rejected Boyde's contention.

Considering the instruction "standing alone," this Court held there was no reasonable likelihood "that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.* at 380-81. The Court explained: "The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly

includes background and character." *Boyde*, 494 U.S. at 382 (emphasis in original). Thus, this Court held that California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted – indeed, it "directed" – consideration of "any other circumstance" in mitigation when determining whether to impose the death penalty. *Id.* at 380-82.

2. The California Supreme Court's Reasonable Application Of *Boyde*

Quoting *Boyde*'s language emphasizing that the "catch-all" instruction constitutionally permitted consideration of "any other circumstance," not just mitigation circumstances related to the crime, the California Supreme Court rejected Payton's claim that the instruction itself precluded consideration of his non-crime related mitigation evidence. P.A. at 160-65. The court held: "While the [trial] court did not embellish the language of factor (k), that fact standing alone does not support a claim of error." P.A. at 164 (citing *Boyde*, 494 U.S. at 381). Given the specificity of *Boyde*'s holding that factor (k) permits consideration of non-crime related mitigation evidence, particularly character evidence, the California Supreme Court had no reason to rule otherwise. *See Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004) ("[T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow.").

It was at least reasonable for the California Supreme Court to apply the same interpretation of the instruction as this Court did in *Boyde* to essentially the same argument that Boyde made. Indeed, there are numerous capital cases in California, pre- and post-*Boyde*, in which the defendant's evidence in mitigation included post-crime character evidence and the court instructed with the same factor (k) instruction used in *Payton* without a claim or finding that the instruction applied to pre-crime

mitigation evidence but not to post-crime mitigation evidence.[4] The California Supreme Court's decision was precisely the sort of eminently reasonable application of this Court's precedents to which AEDPA demands deference.

3. The Ninth Circuit Violated AEDPA In Rejecting The California Supreme Court's Holding

Despite lip service to AEDPA, the Ninth Circuit majority did not analyze the California Supreme Court's decision with a deferential eye. Rather, the majority, as it did in *Andrade*, 538 U.S. at 75, conducted *de novo* review, found error, and labeled it "objectively unreasonable." At the threshold, this can be seen by the similarity in the two opinions issued by the en banc Ninth Circuit – the first premised on *de novo* review, the second purportedly under the AEDPA deference standard. More fundamentally, the Ninth Circuit's analysis of *Boyde* (and its analysis of the California Supreme Court's analysis of *Boyde*) reveals a fundamental unwillingness to grant deference to state court rulings. The California Supreme Court found that the reasoning and holding of *Boyde* instruct that factor (k) directs jurors to consider all character evidence in mitigation, including

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4. *See, e.g., People v. Brown*, 45 Cal. 3d 1247, 1252-57, 756 P.2d 204, 248 Cal. Rptr. 817 (1998) (defendant remorseful and no threat in custody because only threat to women); *People v. Mayfield*, 5 Cal. 4th 142, 167-68, 183-84, 852 P.2d 331, 19 Cal. Rptr. 836 (1993) (remorse and good prisoner); *People v. Gonzalez*, 51 Cal. 3d 1179, 1204, 1224-25, 1231-32, 800 P.2d 1159, 275 Cal. Rptr. 729 (1991) (remorse); *People v. Jones*, 53 Cal. 3d 1115, 1128, 1146, 811 P.2d 757, 282 Cal. Rptr. 465 (1991) (good prisoner); *People v. Hernandez*, 47 Cal. 3d 315, 355, 363, 365-67, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) (difficulty of life in prison, remorse and possibility of positive contribution in prison), *cert. denied*, 491 U.S. 910 (1989).

post-crime character evidence. The Ninth Circuit violated AEDPA by not deferring to that reasonable conclusion.

The Ninth Circuit put forth three reasons for its conclusion that, because the mitigating evidence in this case involved post-crime conduct, *Boyde* "does not control this case." P.A. at 15. First, the court stated that

> [w]hereas there may be no reason to doubt, in light of society's "long held" views, that a jury would consider a defendant's pre-crime background in sentencing him, there is reason to doubt that a jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison.

P.A. at 15-16. That purported distinction between pre-crime and post-crime mitigating evidence cannot withstand scrutiny.

An equally "long held" view is the significance of rehabilitation and remorse in determining an appropriate sentence. *See, e.g., People v. Gonzalez*, 51 Cal. 3d at 1232 ("[T]he defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed."). It is precisely this view that underlies this Court's repeated holdings that the Eighth Amendment requires juries in capital cases to consider post-crime evidence in mitigation, such as remorse or good behavior in prison. *See, e.g., Skipper*, 476 U.S. at 7 ("[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."); *Graham v. Collins*, 506 U.S. 461, 472 (1993) ("[T]he Texas statute satisfied the commands of the Eighth Amendment: It permitted petitioner to place before the jury whatever mitigating evidence he could show, including his age, while focusing the jury's attention upon what that evidence revealed about the defendant's capacity for deliberation and prospects for rehabilitation."); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (death penalty reversed for failure to allow for consideration of non-statutory mitigation including

rehabilitation); *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (consideration of a defendant's future conduct is an inquiry common throughout the criminal justice system). The consideration of post-crime character evidence in determining the appropriate sentence is well rooted in contemporary standards regarding the infliction of punishment.

Neither precedent nor principle supports the sharp distinction drawn by the Ninth Circuit between societal views regarding the importance of "'a disadvantaged background, or . . . emotional and mental problems,'" P.A. at 15, on the one hand, and remorse and good behavior in prison, on the other. To the contrary, human nature suggests that it is *more* difficult to condemn a person who has come to terms with his crime, repented, and rehabilitated, than to condemn an unrepentant sociopath who had a troubled childhood. At the very least, the California Supreme Court was not unreasonable in declining to distinguish *Boyde* based on purported differences in society's "long held" views about the importance of pre- and post-crime character evidence.

The second ground upon which the Ninth Circuit ruled that *Boyde* "does not control this case" was the court's "reading of the words of the unadorned factor (k)." P.A. at 16. In its initial opinion, the en banc Ninth Circuit held that, "[m]ost naturally read, the phrase 'extenuates the gravity of the crime' refers to evidence relating to or ameliorating the crime itself." P.A. at 59. Apparently recognizing that this holding directly contradicted *Boyde*, the second en banc opinion of Ninth Circuit excluded that sentence. But the thrust of the second en banc opinion was the same. Thus, the Ninth Circuit majority insisted: "Any natural reading of the words of the unadorned factor (k) does not support the inclusion of post-crime evidence because mitigation evidence occurring after a crime cannot possibly 'extenuate the gravity of the crime.'" P.A. at 16-17. This is so, according to the Ninth Circuit, because the words of factor (k) apply only to evidence related to "the commission of the crime." P.A. at 16 n.9 (favorably quoting Justice Kennard's dissent in

the California Supreme Court, P.A. at 181). A similar "natural reading" argument was made in *Boyde*, of course, and this Court rejected it.

As noted, Boyde argued that the phrase "any other circumstance which extenuates the gravity of the crime" instructed the jury to consider only "any other circumstance *of the crime*." *Boyde*, 494 U.S. at 382 (emphasis in original). This Court disagreed, concluding that any evidence that might convince a jury that a defendant "may be less culpable" – that might "counsel imposition of a sentence less than death" – is encompassed by the instruction. *Id.* (internal citations and quotation marks omitted).

Moreover, *Boyde* specifically held that the factor (k) instruction, on its face, instructed jurors to consider *character* evidence, which is precisely what Payton presented. *Boyde*, 494 U.S. at 382-83 & n.5. In *Skipper*, this Court recognized that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of character." *Skipper*, 476 U.S. at 7. The California Supreme Court was, therefore, reasonable in concluding that the "words of" factor (k), as construed in *Boyde*, instructed Payton's jury to consider and give effect to his post-crime character evidence in mitigation.

Indeed, to the extent any court in this case applied *Boyde* unreasonably, it was the en banc Ninth Circuit. The Ninth Circuit's view that factor (k) applies only to evidence related to "the commission of the crime" conflicts with *Boyde*'s reading of factor (k) as encompassing any evidence that might convince a jury that a defendant "may be less culpable" and that might "counsel imposition of a sentence less than death."[5] As noted

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5. The Ninth Circuit has applied this same misunderstanding of the language of factor (k) and *Boyde* to grant habeas relief in another death penalty case. *Belmontes v. Woodford*, 350 F.3d 861 (2003), *reh'g denied*, 359 F.3d 1079, 1087 (9th Cir. 2004). A petition for writ of certiorari is currently pending *sub nom. Goughnour v. Belmontes*, Case No. 03-1503.

by the dissent from the initial en banc decision,

> [o]nce one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k).

P.A. at 78.

The key words here are "the gravity of the crime." "'[G]ravity of the crime' focuses not only on the culpability of the criminal, but includes the effect on society in general. To the extent that a criminal taunts or gloats after his crime, the gravity of the crime is enhanced. To the extent that the criminal shows remorse, repents or rehabilitates himself, the gravity of the crime is diminished." *Belmontes v. Woodford*, 359 F.3d 1079, 1087 (9th Cir. 2004) (Bea, J. dissenting, joined by Tallman, J.) Thus, if the defendant presents evidence of a troubled childhood as in *Boyde* or redemption as in *Payton*, such evidence may lessen the "gravity of the crime" because it suggests a basis for a sentence less than death.

This conclusion is reinforced by the nature of the task before the jury. The sole function of the jury at the penalty phase is to determine whether a defendant should receive life in prison or the death penalty. J.A. at 94-96. As noted by the dissent in the initial en banc, "It is difficult to argue that a murder is less severe because of either pre-crime or post-crime circumstances pertaining to the murderer. The victim is dead in either case." P.A. at 77 n.2. However, pursuant to California Penal Code section 190.3,

> the defense is allowed to present whatever constitutionally relevant evidence it wants to persuade the jury to spare the defendant's life, and the jury may choose to spare the defendant's life based on any evidence it concludes "extenuates the gravity of the crime" even though it is "not

a legal excuse for the crime" and even though it does not literally make the crime any less "severe."

P.A. at 77 n.2.

Lastly, drawing from footnote 5 of this Court's decision in *Boyde*, the Ninth Circuit found the Court's listing of distinguishing facts between Boyde's evidence and the post-crime evidence of a model prisoner presented in *Skipper* indicated that the Court did not intend to include post-crime character evidence within the ambit of "background and character" evidence that it found subject to consideration under factor (k). P.A. at 16. However, the question of what does and does not constitute "background and character" evidence was not the issue before or decided by the Court in *Boyde*; the issue was whether factor (k) allowed for consideration of non-crime related evidence in mitigation or was limited to circumstances related to the crime. The Court did not find factor (k) limited to circumstances related to the crime as argued by Boyde, or limited to background and character that *related to the crime* as found by the Ninth Circuit. The Court found factor (k) allowed for consideration of "*any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Boyde*, 494 U.S. at 382 (emphasis in original). Neither the phrase – "any other circumstance" nor "character" – *excludes* Payton's post-crime character evidence in mitigation.

Moreover, footnote 5 only further confirms that factor (k) is not limited to background and character evidence that is *related to the crime* but includes character evidence that would justify a sentence less than death. Footnote 5 responded to Boyde's additional evidence referred to at oral argument to the effect that he had won a dance prize while previously incarcerated. The Court found: "As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Boyde*, 494 U.S. at 382 n. 5. Good character evidence provides

a basis for concluding a defendant's life is worth saving; it does not relate to a defendant's culpability for the crime. Hence, the only way good character is subject to consideration under factor (k), is if the phrase "extenuates the gravity of crime" refers to the appropriate penalty to be imposed considering all of the circumstances presented by the defendant, not just the circumstances related to the crime as argued by the Ninth Circuit

Finally, even if the six judges of the Ninth Circuit correctly construed the words of factor (k) as drawing a line between pre-crime and post-crime mitigating character evidence, that is not the only reasonable interpretation of those words and of *Boyde*. Indeed, the Ninth Circuit itself had previously stated that this "Court has held that this instruction is neither erroneous nor ambiguous on its face." *Babbit v. Calderon*, 151 F.3d 1170, 1178 (9th Cir. 1998). By insisting that the California Supreme Court was objectively unreasonable in failing to apply its novel limitation of *Boyde*, the Ninth Circuit majority utterly disregarded AEDPA. Because the California Supreme Court's application of *Boyde*'s factor (k) holding is reasonable, habeas relief on this basis should be denied.

C. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, Factor (k) "In The Context Of The Proceedings" Satisfied The Eighth Amendment

The third component of the California Supreme Court's decision that the Ninth Circuit found "objectively unreasonable" was the court's holding that factor (k), in the context of the proceedings, satisfied the Eighth Amendment. A key premise underlying the Ninth Circuit's context-of-the-proceedings holding was its prior conclusion that factor (k), on its face, did not instruct the jury to consider Payton's evidence of post-crime character evidence. P.A. at 21. Because it ruled that Payton's "jury was confronted with an ambiguous factor (k) instruction

and with post-crime mitigating evidence that, unlike the pre-crime character and background evidence in *Boyde*, did not clearly fit within the plain wording of the instruction," the Ninth Circuit placed extra weight on the prosecutor's argument. P.A. at 21. As shown in section B, *supra*, this premise was incorrect; Payton's jury, like *Boyde*'s jury, was confronted with an instruction that directed it to consider the mitigating evidence that had been presented to it. The California Supreme Court reasonably concluded that, and then faithfully applied *Boyde*'s principles for assessing whether there was a reasonable likelihood the jury misunderstood the trial court's instructions in the context of the proceedings so as to preclude consideration of constitutionally relevant mitigation evidence.

1. *Boyde's* Analysis Of Factor (k) In The "Context Of The Proceedings"

The Court in *Boyde* addressed whether, "in the context of the proceedings," there was a reasonable likelihood the jury misunderstood factor (k) as precluding consideration of Boyde's non-crime related mitigation evidence. This Court held that even were the language of the "catch-all" instruction "less clear than we think," under the "reasonable likelihood" test, there was no reasonable likelihood that the jury would have believed it could not consider Boyde's mitigation evidence. *Boyde*, 494 U.S. at 383.

The Court examined other instructions, also given to Payton's jury, J.A. at 92-96, which directed the jury to consider mitigation evidence not associated with the crime itself, such as lack of prior criminal activity or felonies, the age of the defendant, and the instruction that the jury "*shall consider all of the evidence* which has been received during any part of the trial of this case." *Boyde*, 494 U.S. at 383 (emphasis in original). This Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of

all *non-crime-related* evidence in mitigation." *Boyde*, 494 U.S. at 383 (emphasis added). Further, because the entirety of Boyde's evidence at the penalty phase related to his background and character, and was introduced without objection, the Court found it "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.'" *Id.* at 383-84 (citation omitted).

Lastly, the Court examined the argument of counsel, observing they generally carry "less weight" with a jury than do instructions from the court. "The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde*, 494 U.S. at 384. The Court found nothing objectionable about the prosecutor's argument that the mitigation evidence did not "'suggest that [petitioner's] crime is less serious or that the gravity of the crime is any less,'" and that "'nothing I have heard lessens the seriousness of this crime'." *Id.* at 385. Defense counsel also properly stressed a broad reading of the "catch-all" mitigation instruction. *Id.* at 386. Accordingly, the Court held that there was no reasonable likelihood that Boyde's jury interpreted California's "catch-all" mitigation instruction to preclude consideration of Boyde's non-crime related mitigation evidence. *Id.*

2. The California Supreme Court's Reasonable Application Of *Boyde*

The California Supreme Court faithfully – and reasonably – applied *Boyde*'s "context of the proceedings" analysis. The court reviewed each of the considerations addressed by this Court and concluded that here, too, there was no reasonable likelihood the jury in Payton's case believed the law required them to disregard his mitigation evidence. "Several considerations" led the court to this conclusion. P.A. at 162.

First, the California Supreme Court noted *Boyde*'s holding that the other instructions given in Boyde's case, which were also given in Payton's, made it "even more improbable that the jurors would arrive at an interpretation [of factor (k)] that precludes consideration of all non-crime related evidence." P.A. at 161.

Second, recognizing that Payton, like Boyde, also asserted a claim that the prosecutor's argument misled the jury concerning the meaning of factor (k), the California Supreme Court identified and applied *Boyde*'s principle that arguments of counsel are not treated as having the same force as the trial court's instruction. P.A. at 161. The court explained:

> Rather than creating a rule to the effect that incorrect remarks by attorneys about the permissible scope of mitigating evidence are presumed to have misled the jury, *Boyde* teaches that there is constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court's instructions as precluding consideration of relevant mitigating evidence offered by the defendant. (*Boyde, supra*, 494 U.S. at pp. 378-381, 386 . . .) *Boyde* also teaches that comments by attorneys "must be judged in the context in which they are made." (*Id.*, at p. 385 . . .)

P.A. at 161.

Thereafter, the California Supreme Court carefully evaluated the prosecutor's argument in the context of the proceeding in which it was made. The California Supreme Court recognized that the prosecutor suggested a narrow and incorrect interpretation of factor (k). But the court found that error blunted by "defense counsel's objection, which led the court to remind the jury that lawyer's comments were 'not evidence' but 'argument' and 'to be placed in [their] proper perspective." P.A. at 162. In so finding, the California Supreme Court cited to *Boyde* and that portion of the decision in which this Court recognized "that such comments 'are likely viewed as the statements of advocates,' especially when 'billed in

advance to the jury as matters of argument, not evidence.'" P.A. at 162 (quoting *Boyde*, 494 U.S. at 384.)

The California Supreme Court also noted the other argument by the prosecutor and found that he implicitly conceded the relevance of Payton's mitigating evidence "by devoting substantial attention to it." P.A. 162. The court observed: "The prosecutor also suggested, properly, how the jury might weigh defendant's evidence [in mitigation] against the evidence in aggravation." P.A. at 162-63. The California Supreme Court reasonably concluded: "Obviously, this exercise by the prosecutor had a point only if it was contemplated the jury *would* consider defendant's evidence." P.A. at 163 (emphasis in original, citations omitted).

Additionally, the California Supreme Court considered the argument of defense counsel, noting: "Defense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence." P.A. at 164. Thus, the state court found that defense counsel's argument further blunted the incorrect argument of the prosecutor. P.A. at 164.

Lastly, as did the Court in *Boyde*, the California Supreme Court considered the nature and extent of the mitigation evidence presented. The California Supreme Court found:

> For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde*, "that reasonable jurors would believe the court's instructions transformed all of [defendant's] 'favorable testimony into a virtual charade.' " (*Boyde, supra*, 494 U.S. at p. 383 [108 L.Ed.2d at p. 331].) The high court's

> observation is especially apt when the trial court, as here, has also instructed the jury to consider "all of the evidence which has been received during any part of the trial" in determining the penalty. (Ibid.)

P.A. at 163. Accordingly, the California Supreme Court held: "On this record, it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence." P.A. at 164.

The California Supreme Court's application of *Boyde* is similar to that employed by this Court in *Buchanan v. Angelone*, 522 U.S. 269 (1998). Like the California Supreme Court, this Court in *Buchanan* found, under *Boyde*, that it was "not likely that the jury would disregard [two days of testimony of mitigation evidence] in making its decision, particularly given the instruction to consider 'all the evidence.'" *Buchanan*, 522 U.S. at 278; *see also People v. Gonzalez*, 51 Cal.3d at 1204, 1224-26 (applying *Boyde*, the California Supreme Court held factor (k) allowed for consideration of defendant's non-crime related mitigation evidence); *Ward v. Whitley*, 21 F.3d 1355, 1365-66 (5th Cir.1994) (applying *Boyde*, the Fifth Circuit found the prosecutor's incorrect argument did not undo the court's correct instructions); *Bonin v. Vasquez*, 794 F. Supp. 957, 979-80 (1992), *aff'd*, 59 F.3d 815 (9th Cir. 1995) (applying *Boyde*, the district court found the prosecutor's incorrect argument did not undo the court's correct instructions). The similar interpretations of the principles of *Boyde* confirms the California Supreme Court's reasonable application of *Boyde*. *See Price v. Vincent*, 538 U.S. at 643 & n.2 (reasonableness of state court's holding was confirmed by similar holdings by other courts).

3. The Ninth Circuit's Readiness To Attribute Error Violates AEDPA

The approach the Ninth Circuit majority took in analyzing the principles of *Boyde* set forth in its "context of the proceedings" analysis further evidences the Ninth Circuit's readiness to attribute error in violation of AEDPA. Instead of accepting the principles of *Boyde* at face value, or finding the California Supreme Court reasonable in doing so, the majority went to extraordinary lengths to corral *Boyde*'s principles to its particular facts. It then found the California Supreme Court objectively unreasonable in not doing the same, notwithstanding that the Ninth Circuit's bare majority opinion in this case is the first one to have so limited the language in *Boyde*.

The Ninth Circuit majority began its analysis of factor (k) "in the context of the proceedings" with the incorrect premise that factor (k) did not naturally allow for consideration of Payton's mitigation evidence. The Ninth Circuit then assessed whether there was anything in the context of the proceedings to counter the allegedly inadequate factor (k), as opposed to whether there was anything to mislead the jury concerning the constitutionally adequate factor (k). As demonstrated above, both the Ninth Circuit's approach and its conclusion that factor (k) applies only to evidence related to the "commission of the crime" contravene *Boyde*.

Additionally, in finding that the California Supreme Court unreasonably applied *Boyde*'s principle that arguments of counsel generally carry "less weight" than instructions from the court, the Ninth Circuit ruled that this principle applies only when there is no objectionable argument by the prosecutor. P.A. at 17 ("Key to the Court's reasoning was the fact that there was 'no objectionable prosecutorial argument.'"). The principle set forth by this Court in *Boyde*, however, did not turn on the correctness of the prosecutor's argument. *Boyde* expressly stated: "This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85. Both the principle that arguments have less force than the trial court's instructions and the recognition that there are exceptions were recognized by the California Supreme Court. P.A. at 161-62. The California

Supreme Court simply determined that the prosecutor's incorrect argument did not undo the court's proper instructions given the context of the entire proceedings.

In that regard, the Ninth Circuit majority also improperly assailed the California Supreme Court for evaluating "the impact of the prosecutor's comments on the jury on the basis of only *one* of his comments." P.A. at 17 n.11 (italics in original). Once again the Ninth Circuit has incorrectly accused a state court of "ignoring" or "failing to consider" something that the state court in fact considered. *Visciotti*, 537 U.S. at 24-25; *see also Middleton v. McNeil*, 124 S. Ct. 1830, 1832 (2004) ("Contrary to the Ninth Circuit's description, the state court did not 'ignor[e]' the faulty instruction. It merely held that the instruction was not reasonably likely to have misled the jury given the multiple other instances . . . where the charge correctly stated . . . .").

The California Supreme Court demonstrated a thorough knowledge of the entire record and specifically addressed the critical aspect of the prosecutor's argument, that the prosecutor misstated the meaning of factor (k), in its decision. The contention that more was required strains credulity. *See Early v. Packer*, 537 U.S. 3, 8-9 (2002) ("The contention that the California court 'failed to consider' facts and circumstances that it had taken the trouble to recite strains credulity. The Ninth Circuit may be of the view that the Court of Appeal did not give certain facts and circumstances adequate weight (and hence adequate discussion); but to say that it did not consider them is an exaggeration."). In that regard, the Ninth Circuit's *presumption* that the California Supreme Court did not consider the entirety of the prosecutor's argument because it quoted portions different that what the Ninth Circuit determined should be quoted is precisely the type of analysis foreclosed by AEDPA. *Visciotti*, 537 U.S. at 24 (AEDPA demands that state-court decisions be given the benefit of the doubt.) Accordingly, the Ninth Circuit was "nowhere close to the mark," *Alvarado*, 124 S. Ct. at 2150, in finding the California

Supreme Court unreasonable in applying *Boyde* to its analysis of the prosecutor's argument.

The Ninth Circuit majority also found that the California Supreme Court unreasonably applied *Boyde* by finding that defense counsel's correct argument "blunted" the impact of the prosecutor's incorrect argument. The majority stated that, "[a]ccording to *Boyde*, only instructions by the court have the force to 'blunt' attorneys' comments." P.A. at 20 n.13. *Boyde* held nothing of the kind; indeed, the proposition is directly contrary to *Boyde*'s directive to consider the context of the proceedings and the Court's express consideration of the correct argument of defense counsel. *Boyde*, 494 U.S. at 386 ("Defense counsel also stressed a broad reading of factor (k) in his argument to the jury:"). The context of the proceedings logically includes arguments of counsel. *Weeks v. Angelone*, 528 U.S. 225, 236 (2000). In fact, the Court in a recent per curiam opinion, *Middleton v. McNeil*, 124 S.Ct. at 1830, rejected a similar attempt by the Ninth Circuit to disregard the impact of correct argument by counsel in assessing a claim of instructional error. In *Middleton*, an AEDPA case, the Ninth Circuit found the California Court of Appeal unreasonable in relying upon the correct argument of a prosecutor in assessing a claim of instructional error. In reversing the Ninth Circuit's decision, the Court held: "Nothing in *Boyde* precludes a state court from assuming that counsel's argument clarified an ambiguous jury charge." *Id.* at 1833. The Ninth Circuit majority therefore erred in finding the California Supreme Court unreasonable in also considering the correct argument of defense counsel.

In a similar fashion the Ninth Circuit reinterpreted the other jury instructions which this Court in *Boyde* held, and the California Supreme Court agreed, made it even more improbable a jury would misunderstand California's "catch-all" mitigation instruction to preclude consideration of non-crime related evidence in mitigation. Thus, contrary to *Boyde*, the Ninth Circuit found that the trial court's additional instructions, which were also given in Boyde's trial, compounded the

problem of the "catch-all" mitigation instruction. P.A. at 20-24. The Ninth Circuit disregarded the other instructions directing the jury to consider non-crime related evidence such as factors (b) [existence of prior violent criminal history], (c) [existence of prior felonies], (i) [age], and the repeated instructions to "consider all of the evidence," as well as the trial court's repeated admonishments to the jury throughout the penalty phase that it heard the evidence and was responsible for evaluating it. J.A. at 81-82, 85-86. The Ninth Circuit instead focused on the phrase at the end of the instructions directing the jury to also be guided by the arguments of counsel. P.A. at 20-24. The Ninth Circuit majority reasoned that this phrase effectively melded the court's instructions with the objectionable portion of the prosecutor's argument. P.A. at 21-23.

But that analysis again fails to give appropriate deference to the California Supreme Court, which carefully examined the instructions and found the same effect as this Court in *Boyde*. Moreover, it is not logical or reasonable to conclude that jurors would parse the instructions and the arguments of counsel in a manner to exclude the *only* mitigating evidence presented by Payton. Unlike other capital defendants, Payton did not offer any evidence of a disadvantaged childhood, abusive father or abusive mother, brain damage, drug abuse or the like. The *only* evidence offered by Payton was his post-crime character transformation.

In that regard, in finding a reasonable likelihood the jury misunderstood the court's instructions, the Ninth Circuit also improperly failed to consider the principle in *Boyde* that a jury would not readily interpret California's "catch-all" mitigation instruction to disregard the *only* evidence presented in mitigation, particularly when there is no objection to the introduction of the evidence. *Boyde*, 494 U.S. at 383-84. As in *Boyde*, all of Payton's penalty phase evidence was *non-crime* related character evidence in mitigation. Thus, as in *Boyde*, it is unlikely that reasonable jurors would believe the court's

instruction transformed all of this favorable testimony into a "virtual charade." *Boyde*, 494 U.S. at 383-84.

As this Court noted in *Boyde*, the "reasonable likelihood" test does not turn on whether a single hypothetical "reasonable" juror could or might have interpreted an instruction in a way that prevents consideration of constitutionally relevant evidence. Rather, it turns on whether there was a reasonable likelihood the jury as a whole could have or might have done so. *Boyde*, 494 U.S. at 380. The Court reasoned that:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at trial likely to prevail over technical hairsplitting.

Id. at 380-81. Contrary to *Boyde*, the Ninth Circuit's analysis improperly bespeaks a solitary isolation booth in which the instructions were parsed and the most unlikely meaning given to exclude the only evidence presented.

Indeed, even applying *de novo* review, seven judges of the Ninth Circuit agreed with the five justices of the California Supreme Court and likewise found that there was no reasonable likelihood that Payton's jury understood the instructions so as to preclude consideration of his post-crime evidence in mitigation. P.A. at 31-41. Thus, even though the Ninth Circuit majority did not agree with the California Supreme Court's decision that there was no constitutional error, "it was at least reasonable" for the California Supreme Court "to conclude otherwise." *Price v. Vincent*, 538 U.S. at 643. Consequently, under AEDPA habeas relief is precluded.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Dated: August 5, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

STEVEN T. OETTING
Supervising Deputy Attorney General

MELISSA A. MANDEL
Deputy Attorney General

A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

ANC:nes
SD2000XF0003

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In The
Supreme Court of the United States

JILL L. BROWN, Acting Warden,

Petitioner,

v.

WILLIAM CHARLES PAYTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

ROSALIE L. RAKOFF
A Professional Corporation
1950 Sawtelle Blvd.
Suite 310
Los Angeles, California 90025

MARIA E. STRATTON
Federal Public Defender
DEAN R. GITS*
Deputy Federal Public Defender
MARK R. DROZDOWSKI
Deputy Federal Public Defender
KIM SAVO
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-7867
Facsimile: (213) 894-0081

Counsel for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the California Supreme Court render a decision which was contrary to or an unreasonable application of established federal law as determined by the Supreme Court of the United States in deciding that in the trial of Respondent's case, there was no reasonable likelihood that the jury believed that it was precluded from considering the post-crime mitigating evidence that Respondent presented at his penalty trial?

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STATEMENT OF THE CASE

I. Payton's Trial

In 1981, a California jury convicted Respondent William Payton ("Payton") of first degree murder and rape and two counts of attempted murder. P.A. 140.[1] The jury found true the special circumstance allegation that the murder was committed while engaged in the commission or attempted commission of rape, and this finding made Payton eligible for the death penalty. *Id.*; *Tuilaepa v. California*, 512 U.S. 967, 975 (1994) (describing California's death penalty scheme). The defense presented no evidence at the guilt trial. P.A. 143.

A. The Evidence in Aggravation and Mitigation

At the penalty trial, both sides waived opening statements. J.A. 3, 4, 15.[2] The State presented evidence in aggravation that seven years before the murder, Payton had stabbed a woman. J.A. 5-10. Pursuant to stipulation, the State presented evidence that four years before the murder Payton had been convicted of possessing marijuana and having unlawful consensual intercourse with a minor. J.A. 4-5. The State also presented the testimony of an inmate who claimed that while Payton was in jail awaiting his murder trial, Payton admitted to him that he "had a severe problem with sex and women" and that he would "[s]tab them and rape them." J.A. 12.

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[1] "P.A." refers to the appendix submitted with the State's Petition for Writ of Certiorari.

[2] "J.A." refers to the Joint Appendix filed by the parties.

The defense mitigation case consisted entirely of evidence that in the year and nine months since his arrest for murder, Payton had experienced a religious conversion and engaged in good works in jail, and would lead a useful life if sentenced to life in prison. J.A. 15-73; P.A. 15, 144, 159, 175-76.

Payton presented eight witnesses. J.A. 15-54. A minister testified that Payton's commitment to the Lord was sincere; the minister observed great remorse and regret in Payton for the things that he had done. J.A. 15, 18. A Christian fellowship missions director testified that because of his religious conversion, Payton had changed from self-centered to selfless, that he had established Bible study classes in jail, and that other inmates came to him for counseling. J.A. 19, 22, 23, 26. Four fellow inmates testified that Payton's religious conversion was sincere, that he had a positive and calming influence on other inmates, and that he had even persuaded one inmate not to commit suicide. J.A. 33, 34, 37-44. A deputy sheriff testified that Payton led Bible study sessions in jail, that he appeared to have a leadership role with other inmates, and that his influence on other inmates had been positive. J.A. 45-48. Payton's mother testified that since his arrest Payton had become "totally immersed in the Lord" and was a changed man. J.A. 52, 53.

The defense presented no evidence of Payton's conduct or condition at the time of the murder or any time before. That is, the defense did not present any "pre-crime" mitigating evidence, only "post-crime" mitigating evidence of his religious conversion and positive adjustment to incarceration since his arrest.

B. The Jury Instruction at Issue

The jury received an instruction designed to guide its consideration of the aggravating and mitigating evidence. J.A. 94-95; P.A. 7-9, 52-54, 94-95. The instruction was taken verbatim from a then-existing form instruction, California Jury Instructions, Criminal ("CALJIC") 8.84.1 (4th ed. 1979). J.A. 57-59; P.A. 7-9, 52-54, 94-95. The instruction incorporated the 11-factor test from California's death penalty statute (California Penal Code §190.3) that requires the jury to weigh and balance specific aggravating and mitigating circumstances in deciding whether to impose the death penalty. J.A. 94-96, P.A. 3, 187-90. The instruction stated:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
>
> (c) Presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

J.A. 94-95; *see also* P.A. 7-9, 52-54, 94-95.

C. Denial of Payton's Requests to Modify the Instruction

Before the court instructed the jury, and before the penalty phase closing arguments, defense counsel asked at an in-chambers conference that the foregoing instruction be modified in two ways. J.A. 55; P.A. 7, 9. First, the defense requested that factor (k) be modified to read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including evidence of the defendant's character, background, history, mental condition and physical condition." J.A. 55. Defense counsel noted that the additional language appeared in the death penalty statute. *Id.*; P.A. 187 ("In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to . . . the defendant's character, background, history, mental condition and physical condition."). Counsel argued that without the modification, a juror could read factor (k) "as saying, well, gee, there are a lot of interesting things about Mr. Payton, but they don't have anything to do with the crime. They have something to do with his potential for rehabilitation or his character or his background, but they don't have anything to do with the crime itself. . . . " J.A. 55.

The prosecutor objected to Payton's request. J.A. 55. The prosecutor argued: "I don't think that's at all what they mean by 'k.' I don't think his background or character has anything to do with 'k' because if it did, they'd say it." J.A. 57. He continued: "I read 'k' as being a circumstance attending a crime. That's the way I read it. Not a factor and background, the defendant's history; or else the Legislature would have said that." J.A. 58. The prosecutor

stated that he thought defense counsel could argue to the jury that it could consider Payton's mitigating evidence under factor (k), "but it's not what 'k' says either in the statute or CALJIC." J.A. 56-57.

The court stated: "I think the way I read the cases – and there isn't much case law – and the way I read 'k,' I think, as I said, it's wide open"; (k) is a "catch-all . . . intended . . . for all these factors . . . that don't fall into the other areas." J.A. 60; *see also id.* (the court further explains: "I think 'k' is the all encompassing one" and under (k) "almost anything can come in on behalf of the defendant").

Although the court agreed with Payton that the jury could consider his mitigating evidence under factor (k), it denied his request to modify and clarify the instruction. J.A. 59-60. The court stated that although it "could see [the defense] position for the edification and clarification of the jury," it was reluctant to "change a CALJIC instruction wherein it's verbatim from the 190.3 [death penalty] statute. . . . " J.A. 58-59.[3]

The court adopted the prosecutor's proposal to allow the parties to argue to the jury whether it could consider

[3] CALJIC instructions are created by a committee of the Los Angeles County Superior Court and "are only recommendations and do not carry the force of law." *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997) (en banc), *overruled on other grounds*, *Weeks v. Angelone*, 528 U.S. 225 (2000). CALJIC itself "emphasizes that '[a] trial judge in considering instructions to the jury shall give no less consideration to those submitted by the attorneys for the respective parties than to those contained in the latest edition of . . . [CALJIC].'" *Id.* "All trial judges, prosecutors, and defense attorneys in California understand both the value of CALJIC recommendations, and their limitations." *Id.* at 840-41.

Payton's mitigating evidence under factor (k). J.A. 59. Defense counsel objected: "The only problem I have with that is that 'k,' at least taken at face value, refers to extenuating the gravity of the crime, even though it's not a legal excuse for the crime. It doesn't sound to me like 'k' incorporates the other factors, even though I'm sure that was the intent of the Legislature." J.A. 59. The prosecutor replied: "I think he's stuck with trying to argue it." *Id.* The court affirmed that it agreed with defense counsel that Payton's mitigating evidence could be considered under factor (k), but it stuck by its ruling. J.A. 59-60.

Defense counsel made "one last observation": "My only problem is I think we all agree that that's the law [i.e., that the jury had to consider Payton's mitigating evidence under factor (k)], but the jury's not going to know." The court responded: "I agree with you. . . . But I'm going to deny it. . . . " J.A. 60-61.

Payton's second request to modify CALJIC 8.84.1 sought to add a factor (l) to inform jurors that "they may take into consideration the defendant's potential for rehabilitation." J.A. 57. The district attorney objected to the request, and the court denied it. *Id.*

D. The Prosecutor's Closing Argument

In closing argument, the prosecutor repeatedly argued to the jury that it legally could not consider any of the mitigating evidence presented by Payton. The prosecutor recited factors (a) through (k) of CALJIC 8.84.1 and then informed the jury "which ones seem to be applicable and which ones do not." J.A. 64-66. He argued that factors (a) through (c) were applicable and were aggravating factors, and that (d) through (h) and (j) were inapplicable. With

regard to factor (i) (defendant's age, 26 at the time of the crime), he stated that "[s]ome of you might consider that not to be a factor. Some of you might consider that young, to be somewhat mitigating." J.A. 67, 68.

Turning to factor (k), the prosecutor stated:

> I want to stop and talk to you about "k" for just a second because – and go over the wording.
>
> "K" says any other circumstance which extenuate or lessens the gravity of the crime. What does that mean? *That to me means* some fact – okay? – *some factor at the time of the offense* that somehow operates to reduce the gravity for what the defendant did.
>
> *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.*

J.A. 68 (emphasis added).

Defense counsel interrupted the prosecutor's argument, and asked to approach the bench. Outside the presence of the jury, the following colloquy occurred:

> Mr. Merwin [defense counsel]: I don't know if the Court heard that part of the argument, but I think that's completely contrary to what we all agreed in chambers on the record "k" was designed to apply to. And I think this justifies a mistrial and [I] move for a mistrial right now on prosecutorial misconduct.
>
> * * *
>
> The Court: Well, as I understand the comments of the prosecutor is that they feel that the

> religious aspect of this as far as being a mitigating factor does not apply because it took place after the crime. Is that your position, Mr. Jacobs?
>
> Mr. Jacobs [the prosecutor]: Yeah, it doesn't read into "k". . . . If he wants to argue it does, that's his problem. But it doesn't.

J.A. 68-69.

The court did not declare a mistrial, stating: "I think you can argue it either way." J.A. 69. Defense counsel then renewed his request to modify the instruction to add language from the death penalty statute. *Id.* The court ruled:

> Well, I'd decline to do that at this time. I think you gentleman are entitled to argue that under "k," that you can make that argument either way. So again, I'm just going to indicate to the jury that that – what you gentleman say is not evidence, and I'll admonish them in any respect.

Id. The court then admonished the jury:

> I want to emphasize to you that the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I've said, this is argument. And it's to be placed in its proper perspective. So with that in mind, you may continue, Mr. Jacobs.

J.A. 69, 70.

Immediately after the court's admonition, the prosecutor launched back into his argument that the jury could not consider Payton's mitigating evidence:

> Referring back to "k" which I was talking about, any other circumstance which extenuates

or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.

The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

Mr. Merwin will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when – under any other circumstance which extenuates or lessens the gravity of the crime, refers – seems to refer to a fact in operation at the time of the offense.

> *What I am getting at, you have not heard during the past few days any legal evidence mitigation* [sic]. What you've heard is just some jailhouse evidence to win your sympathy, and that's all.
>
> *You have not heard any evidence of mitigation in this trial.*

J.A. 70 (emphasis added).

Although the prosecutor repeatedly argued that the jury could not legally consider Payton's evidence suggesting that he would lead a constructive life if he was sentenced to life in prison, he argued that Payton would rape and kill again if he was not sentenced to death.

> Here also is a defendant who in his words to Alex Garcia [a prosecution guilt phase witness] has a "urge to kill" and why should we give a

> defendant to [sic] feed that urge agair Even when he – if in prison, what if Mr. Payton gets that urge to kill, if he sees the back of a prison guard again.
>
> Here's a defendant who views all women as his potential victims, who wants to rape and stab them. Why should we give this defendant another chance of finding another victim.

J.A. 72-73.

The prosecutor returned to his argument that the jury could not consider Payton's mitigating evidence:

> To vote for life without possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and *you've heard no evidence of any mitigating factors.*

J.A. 73 (emphasis added).

He continued:

> *I want to make a few comments about religion, the only evidence put on by the defendant.* I don't really want to spend too much time on it because *I don't think it's really applicable and I don't think it comes under any of the eleven factors*, and I certainly don't mean to demean a religion by any way, in what I say.

J.A. 73 (emphasis added).

Toward the end of his argument, the prosecutor stated:

> How do the factors line up? The circumstances and facts of the case, the defendant's

other acts showing violence, Mrs. Pensinger and Mrs. Stone, her – Blane [sic] Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old. This is not close.

You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery, and I really doubt if Mr. Merwin would dispute that breakdown of the facts.

J.A. 76.

E. The Defense Closing Argument

In his closing argument, defense counsel discussed factors (a) through (j), and "agree[d] that many of the factors . . . are just plain not applicable." J.A. 77. He did not argue that any of the mitigating evidence presented by the defense applied under any of factors (a) through (j).

Defense counsel stated that he disagreed "rather strenuously" with the prosecutor on the applicability of factor (k), J.A. 88, and he tried to convince the jury that it could consider Payton's mitigating evidence under (k). Counsel argued:

> This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phase [sic]. It was designed to include, not exclude, that kind of evidence.
>
> * * *

> I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of the factors. . . .

J.A. 88-89.

As to the substance of the evidence, defense counsel argued:

> [T]he evidence to me demonstrated that he has found a new productive, forward looking purpose for his life, and he plans to devote his life to that, namely, his prison ministry.
>
> * * *
>
> I think there are a lot of good reasons to keep Bill Payton alive, an awful lot of good reasons. And that's exactly what I think "k" is talking about.

J.A. 92.

F. The Penalty Instructions and Verdict

The jury received the form CALJIC 8.84.1 instruction without the modifications requested by Payton. J.A. 55-61, 94-95. The jury was also instructed that:

> After having heard all of the evidence and *after having heard and considered the argument of counsel,* you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, *you shall impose a sentence of death.*

> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

J.A. 96 (emphasis added). The jury returned a death verdict. P.A. 2, 140.

II. Revisions to the Factor (k) Instruction Shortly After Payton's Trial

In 1983, two years after Payton's trial, the California Supreme Court ruled that

> [i]n order to avoid potential misunderstanding in the future, trial courts – in instructing on the factor embodied in section 190.3, subdivision (k) – should inform the jury that it may consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and any other "aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."

People v. Easley, 34 Cal. 3d 858, 878 n.10, 671 P.2d 813, 196 Cal. Rptr. 309 (1983) (*quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); P.A. 160, 178. The court was concerned that "CALJIC 8.84.1 – while listing a variety of aggravating and mitigating factors – does not explicitly inform the jury that it may consider *any* mitigating factor proffered by the defendant." *Easley*, 34 Cal. 3d at 878 (emphasis in original); *People v. McLain*, 46 Cal. 3d 97, 113-14, 757 P.2d 569, 249 Cal. Rptr. 630 (1988) ("the language of former factor (k) – with its exclusive focus on 'the crime' and not 'the criminal' – might mislead jurors

about the scope of their responsibility under the Constitution and about the evidence they might consider in exercising their responsibility"). The form CALJIC 8.84.1 instruction was changed to reflect the court's ruling. *People v. Davenport*, 41 Cal. 3d 247, 284 n.14, 710 P.2d 861, 221 Cal. Rptr. 794 (1986).

III. The California Supreme Court Opinion Denying Payton's Claim

The California Supreme Court denied the claim at issue here by a five-to-two vote in 1992. P.A. 139-86; *see especially id.* at 159-65. Relying on *Boyde v. California*, 494 U.S. 370 (1990), the majority held that it was not reasonably likely that Payton's jury was misled to believe that it was not permitted to consider Payton's mitigating evidence. P.A. 159, 162.

The state court explained that in *Boyde*, "the United States Supreme Court . . . held that the language of factor (k) satisfies the federal Eighth Amendment." P.A. 160. It noted that *Boyde* had "reasoned that factor (k) does not, as the petitioner in that case argued, 'limit the jury's consideration to "any other circumstance *of the crime* which extenuates the gravity of the crime."' [Citation omitted.] Instead, the factor directs the jury 'to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.'" P.A. 160-61. The court stated that "*Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k). . . . However, in evaluating such claims we do not treat comments by attorneys as if they had the same force as the trial court's instructions on the law." P.A. 161.

"*Boyde* also teaches that comments by attorneys 'must be judged in the context in which they are made.'" *Id.*

The court explained that several considerations led it to reject Payton's claim. P.A. 162. The court observed that although "[i]t is true that the prosecutor during closing argument suggested a narrow and incorrect interpretation of factor (k)," "[a]ny impact this argument may have had . . . was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument,' 'to be placed in their proper perspective.'" P.A. 162.

The court emphasized that "[l]ater in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." P.A. 162. The court noted that "[t]he prosecutor also suggested, properly, how the jury might weigh defendant's evidence against the evidence in aggravation." P.A. 162-63. The court concluded that "[o]bviously, this exercise by the prosecutor had a point only if it was contemplated that the jury *would* consider defendant's evidence." P.A. 163 (original emphasis).

Further, according to the court, "[f]or the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison." P.A. 163. The court thought "it unlikely, however, as did the high court in *Boyde*, 'that reasonable jurors would believe the court's instructions transformed all of defendant's "favorable testimony into a virtual charade."'" *Id.* The court found "[t]he high court's observation . . . especially apt when the

trial court, as here, has also instructed the jury to consider 'all of the evidence which has been received during any part of the trial' in determining the penalty." *Id.*

Finally, the court emphasized that "[d]efense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence." P.A. 164.

IV. Payton's Federal Habeas Action

Payton asserted his instruction claim in a federal petition for writ of habeas corpus filed on May 6, 1996. The district court granted penalty relief on the ground that Payton's penalty trial was rendered fundamentally unfair by the prosecutor's misconduct in incorrectly arguing to the jury that it could not consider Payton's mitigating evidence. P.A. 138. A panel of the Ninth Circuit Court of Appeals reversed the district court. P.A. 98-107. An en banc panel then granted penalty relief on Payton's instruction claim. P.A. 46-86. This Court granted the State's petition for a writ of certiorari, vacated the en banc decision, and remanded the case for further consideration in light of *Woodford v. Garceau*, 538 U.S. 202 (2003), P.A. 45, a case that made Payton's habeas action subject to the provisions of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§2241 *et seq.* ("AEDPA"). Applying AEDPA, an en banc panel of the Ninth Circuit held that the California Supreme Court unreasonably applied clearly established federal law to the facts of Payton's case in denying Payton's instruction claim. P.A. 1-44.

SUMMARY OF ARGUMENT

Today, there is no question that the Eighth Amendment requires a sentencing jury to consider any evidence a capital defendant proffers as a basis for a sentence less than death. But in 1981, when William Payton's penalty trial was held, the law was much less clear. It was that lack of clarity that caused the problem that occurred in this case. Through a jury instruction that was ambiguous, conflicting interpretations of that instruction argued by the prosecutor and the defense counsel, and the failure of the trial court to resolve the conflict and clearly instruct the jury on the law, Payton's jury likely did not understand its obligation to consider the evidence the defense had presented when making its decision as to whether Payton should live or die.

California enacted a new death penalty statutory scheme in 1977. With minor changes, this scheme was approved by voter initiative in 1978. California Penal Code, §190.3. The statutory scheme provides that a sentence of death is to be imposed if the aggravating circumstances outweigh the mitigating circumstances and a sentence of life in prison without the possibility of parole is to be imposed if the mitigating circumstances outweigh the aggravating circumstances. The scheme also includes factors the jury is to consider in weighing the aggravating circumstances against the mitigating circumstances. All but one of the factors relate to the circumstances of the capital offense, the defendant's capacity or condition at the time of the offense, or the defendant's prior criminal history. The final factor listed in the statute is (k): "Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime." This statutory list of factors was, for many years, including at

the time of Payton's trial, the instruction given to guide the jury in its penalty determination.

In 1978, this Court decided *Lockett v. Ohio*, 438 U.S. 586, holding that the Eighth Amendment requires a capital jury to consider mitigating evidence presented by the defendant. The evidence that Lockett's jury had been precluded from considering had included evidence of her minor role in the offense, her lack of a criminal record, her age and her history of mental health problems. This Court did not decide another case about the right of a capital defendant to have his mitigating evidence considered until 1982 in *Eddings v. Oklahoma*, 455 U.S. 104, the year after Payton's trial.

In 1979, the California Supreme Court upheld factor (k) against a claim that the provision was over-broad because it allowed the jury unbridled discretion with respect to the penalty decision. *People v. Frierson*, 25 Cal. 3d 132, 178, 599 P.2d 587, 158 Cal. Rptr. 281. The *Frierson* court noted that a capital defendant had similar latitude in the presentation of mitigating evidence, *id.*, but the factor (k) instruction given to penalty juries continued to simply quote verbatim the language of the statute.

It was not until 1983, in *People v. Easley*, 34 Cal. 3d 858, 878, 671 P.2d 813, 196 Cal. Rptr. 309 (1983), that the California Supreme Court recognized that there was "some force" to the argument that the wording of the factor (k) instruction was "potentially misleading." Citing *Lockett*, the *Easley* court instructed trial courts to add to the instruction a specific advisement to the jury to consider "any other aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." 34 Cal. 3d at 878 n.10. The standard penalty

instruction, CALJIC 8.84.1, was changed after *Easley* to incorporate the holding in that case. *People v. Davenport*, 41 Cal. 3d 247, 284 n.14, 710 P.2d 861, 221 Cal. Rptr. 794 (1986); *People v. Brown*, 40 Cal. 3d 512, 541, 726 P.2d 516, 230 Cal. Rptr. 834 (1986).

In 1981, Payton's jury was instructed pursuant to the language of factor (k) prior to the *Easley* adornment. *Lockett* had already been decided and may have adequately conveyed to attorneys and judges the requirement that the jury consider *Lockett*-type evidence, that is, mitigating evidence that existed at the time of, and related to, the offense. But Payton's proffered mitigating evidence was exclusively post-offense evidence, consisting of his post-arrest religious conversion and his ensuing good works in jail. It was not until 1986, in *Skipper v. South Carolina*, 476 U.S. 1, that this Court held that the *Lockett* principle applied to mitigating evidence subsequent to the offense, evidence that would include good conduct in jail. The pre-*Easley* language of factor (k) was sufficiently ambiguous that the prosecutor and the defense attorney in this case had conflicting interpretations: the prosecutor believed post-offense evidence was not relevant to the jury's consideration while defense counsel pleaded for an instruction that clearly told the jury of the requirement to consider the mitigating evidence that had been presented.

The trial court refused to give any instruction other than the standard, pre-*Easley* instruction. More significant, the trial court allowed the attorneys to argue their respective interpretations to the jury and gave no guidance to the jury as to how to resolve the conflict in interpretations. In short, the trial court allowed the jurors to determine for themselves whether the evidence was relevant to the penalty determination.

In *Boyde v. California*, 494 U.S. 370 (1990), this Court held that the pre-*Easley* factor (k) instruction was not likely to have misled the jury into not considering Boyde's proffered mitigating evidence. Boyde's proffered mitigation was evidence of his impoverished childhood and disadvantaged background; and the *Boyde* court saw "no reason to believe that reasonable jurors would resist the view, 'long held by society' . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" *Id.* at 382 (emphasis in original). The *Boyde* court also pointed out that there was no "objectionable prosecutorial argument"; the prosecutor "never suggested that the background and character evidence could not be considered." *Id.* at 385. And *Boyde* set forth factors to consider in determining whether a penalty jury was misled about consideration of the mitigating evidence, factors which include the nature of the evidence proffered, arguments of counsel and other instructions given by the court.

The California Supreme Court, relying on *Boyde*, rejected Payton's contention that his jury had been misled about consideration of his proffered mitigating evidence. In doing so, however, the California court simply followed the holding in *Boyde* without consideration of the differences between the two cases and without consideration of the very factors that this Court held in *Boyde* are to be considered. The state court not only was wrong in concluding that Payton's jury understood the requirement to consider the mitigating evidence, its application of the settled law at the time of its decision, law that included *Skipper* as well as *Boyde*, was unreasonable.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT WRONGLY DECIDED PAYTON'S CLAIM

As shown below, the California Supreme Court wrongly decided Payton's jury instruction claim. As shown in section II, *infra*, the court's decision was an unreasonable application of clearly established federal law that entitles Payton to relief under AEDPA.

A. Payton's Eighth Amendment Right to Have His Jury Consider and Give Effect to His Mitigating Evidence in Determining Penalty

At the time of the California Supreme Court's decision, it was settled law that in capital cases, the sentencer could not refuse to consider or be precluded from considering any relevant mitigating evidence offered by the defendant. *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 307, 320, 328 (1989) (reversing death sentence because jury was not instructed that it could consider and give effect to defendant's mitigating evidence), *overruled on other grounds, Atkins v. Virginia,* 536 U.S. 304 (2002); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality states three years before Payton's trial "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (original emphasis) (footnotes omitted).

It was also settled that "relevant mitigating evidence" included evidence of a defendant's good behavior in jail after his arrest on the capital charge, and evidence of his

likely future productive life in prison. *Skipper v. South Carolina*, 476 U.S. 1, 4, 7, 8 (1986); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances").

B. The Context of the Proceedings at Payton's Trial

When a capital defendant contends that an ambiguous instruction misled the jury to believe it could not consider his mitigating evidence, the court must examine the "context of the proceedings" to resolve the claim, including the nature of the evidence presented, the arguments of counsel to the jury, and the other instructions given. *Boyde*, 494 U.S. at 383-86. The question is whether, viewing the entire context, "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 379. "Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition." *Id.*

1. The Type of Evidence Presented

The most common type of mitigating evidence presented by a capital defendant is evidence regarding background, usually an impoverished childhood, often an abusive upbringing, frequently pre-existing mental health conditions. As this Court recognized in *Boyde*, there is "no reason to believe that reasonable jurors would resist the

view, 'long held by society' . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." 494 U.S. at 382 (original emphasis). Thus, an instruction advising the jury to consider any "evidence which extenuates the gravity of the crime," the language of factor (k) as given to Payton's (and Boyde's) jurors, conveys to the jury the relevancy of background evidence.

But Payton's mitigation case consisted entirely of evidence of his behavior after the capital crime, and he argued that his evidence made him worth saving despite the gravity of the crime. Payton's evidence does not fit within the language of factor (k) because it does not extenuate the gravity of the crime or make him less culpable than defendants who do not share the traits and history he presented to his jury. As this Court explained in *Skipper*, evidence that a capital defendant has been a well-behaved and well-adjusted prisoner, and the favorable inferences therefrom regarding his character and probable future conduct, although mitigating, "would not relate specifically to [the defendant's] culpability for the crime he committed." 476 U.S. at 4. If the *Skipper* Court viewed such evidence in this fashion, it is reasonably likely that Payton's jury had the same view, and agreed with the prosecutor that it could not consider Payton's evidence because it was not a "circumstance which extenuates the gravity of the crime."

2. The Prosecutor's Incorrect Argument

The prosecutor repeatedly argued to the jury that legally it could not consider any of Payton's mitigating evidence. Thus, the prosecutor argued:

> "K" says any other circumstance which extenuate or lessens the gravity of the crime. What does that mean? *That to me means* some fact – okay? – *some factor at the time of the offense* that somehow operates to reduce the gravity for what the defendant did.
>
> *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.*

J.A. 68 (emphasis added); J.A. 70-76 (similar statements by the prosecutor). The State admits that the prosecutor's argument was incorrect. Brief for Petitioner ("Pet. Br.") at 6.[4]

3. The Trial Court's Failure to Resolve the Conflict in Interpretation of the Instruction

The trial court's inadequate instructions and responses to the prosecutor's incorrect argument resulted in the jury having to decide the legal question of whether it could even consider Payton's mitigating evidence.

Before closing arguments, the court rejected Payton's requests to modify the instructions to inform the jury that it could consider evidence of Payton's rehabilitation, character, background, history, mental condition and physical condition. J.A. 55-56.

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[4] At the oral argument before this Court in *Boyde*, the California Attorney General conceded that at Payton's trial, "the prosecutor in his closing summation 'misled the jurors' by arguing that the jury could not consider evidence, presented at the penalty phase of this capital case, that defendant had experienced a religious awakening." P.A. 174-75, 179-80.

During the prosecutor's closing argument, defense counsel objected to the inaccurate interpretation of law proffered by the prosecutor. Although the trial court had previously stated, again outside the presence of the jury, that it agreed with Payton that his evidence applied under factor (k), it overruled Payton's objection, denied his motion for a mistrial, and adopted the prosecutor's suggestion that counsel could argue to the jury their opposing interpretations of the legal scope of factor (k). The court then admonished the jury that the comments of counsel are not evidence but argument, and "it's to be placed in its proper perspective." However, the court never provided that perspective, but instead left the jury to decide for itself which of the competing views of the law was correct and whether it was allowed to consider Payton's evidence. Further, immediately after the admonition the prosecutor launched right back into his argument that the jury could not consider Payton's mitigating evidence, and he repeated that argument in the rest of his closing. That could only suggest to the jury that the defense objection had failed and the prosecutor's argument was sanctioned by the court.

Over a century ago, this Court explained that "in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law. . . . " *Sparf v. United States*, 156 U.S. 51, 102 (1895). These fundamental roles were subverted here. Because the trial court abdicated its duties to instruct the jury on the law and supervise the arguments of counsel accordingly, the jury was left to decide not only whether Payton should live or die (a monumental task in any

capital penalty trial), but also the preliminary legal question whether it could consider Payton's mitigating evidence at all. Only if every juror answered the preliminary question in the affirmative, i.e., that he or she was permitted to consider Payton's evidence as a matter of law, could Payton's Eighth Amendment right to have the jury give effect to his mitigating evidence possibly be vindicated. There is no assurance how the jurors answered that preliminary question.

It is hard to imagine a court having confidence in any criminal judgment resulting from a proceeding in which the jury was required to play the role of judge and determine which of the parties' competing views of relevance was correct as a matter of law. *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ("A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part."); *Carter v. Kentucky*, 450 U.S. 288, 302 (1981) ("Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.") A death judgment resulting from such a perverted process is too unreliable to stand. *Penry*, 492 U.S. at 328 ("in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its decision").

4. Other Instructions Compounded the Harm

The jury received an instruction to consider "all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed." J.A. 94. This instruction was immediately followed by the list of 11 penalty factors, including factor (k). *Id.*

The jury was further instructed that "[a]fter having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider . . . the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." J.A. 96. Thus, the jury was instructed to consider the prosecutor's erroneous argument that Payton's entire penalty presentation did not qualify as mitigating evidence. The instructions compounded the harm of the prosecutor's repeated, incorrect arguments and made it more likely that the jury disregarded Payton's evidence.

C. The Reasonable Likelihood Payton's Mitigation Was Not Considered

When examined in the context of the actual proceedings in Payton's case, as required by *Boyde*, it is beyond doubt that there is a reasonable likelihood that the jury did not understand the requirement to consider the mitigating evidence. The instructions did not clearly advise the jurors of that requirement, the prosecutor and defense counsel argued conflicting interpretations of the instructions regarding consideration of mitigation, and the trial court did nothing to resolve that conflict for the jury. Given that the type of mitigation that was presented was

exclusively post-crime evidence and, as *Skipper* recognizes, such evidence does not reduce culpability for the offense but rather offers the jury a non-offense reason to spare the defendant's life, the conclusion becomes inescapable that there can be no reasonable assurance that Payton's jury understood the requirement to consider his mitigating evidence.

II. THE CALIFORNIA SUPREME COURT'S DECISION INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

Under AEDPA, a habeas petition challenging a state court judgment "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . " 28 U.S.C. §2254(d)(1). "Clearly established federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

Clearly established federal law at the time of the state court decision here held that in capital cases, the sentencer may not refuse to consider, or be precluded from considering or giving effect to, any relevant mitigating evidence offered by the defendant, including evidence of a defendant's good behavior in jail after his arrest on the capital charge and of his likely future productive life in prison. *Penry*, 492 U.S. at 321-22, 328; *Hitchcock*, 481 U.S. at 394; *Skipper*, 476 U.S. at 4, 7, 8. Clearly established

federal law also required that when a capital defendant asserts that an ambiguous instruction misled the jury to believe it could not consider his mitigating evidence, the court must examine the "context of the proceedings," including the nature of the evidence presented, the arguments of counsel to the jury, and the other instructions given, to resolve the claim. *Boyde*, 494 U.S. at 383-86.

The state court relied on the outcome in *Boyde* in denying Payton's claim. The court's decision was not only wrong, as shown above, but an unreasonable application of clearly established federal law under AEDPA. The court's conclusion that *Boyde* required, or even supported, its holding is unreasonable because *Boyde* did not address the instruction at issue here in the context of post-crime evidence. Indeed, *Boyde* explicitly distinguished the type of evidence at issue there – pre-crime evidence of defendant's life history – from evidence that "pertain[s] to prison behavior after the crime for which [the defendant] was sentenced to death, as was the case in *Skipper*," 494 U.S. at 382 n.5, and here. *Boyde* also did not address other salient facts present here: repeated arguments by a prosecutor that the jury could not consider any of the defendant's mitigating evidence, and a trial court's failure not only to correct such arguments, but to force the jury to decide whether it could consider the evidence as a matter of law.

Boyde is an instrumental case, designed to effectuate and protect "[t]he Eighth Amendment require[ment] that the jury be able to consider and give effect to all relevant mitigating evidence offered by" the defendant. 494 U.S. at 377-78, 383. By applying *Boyde* as it did, the state court frustrated *Boyde*'s larger purpose, and the clear mandate of *Skipper*, *Penry*, *Eddings* and *Lockett*. As the Ninth Circuit properly held, and Payton shows below, the state

court decision unreasonably applied clearly established Supreme Court precedent to the facts of this case. P.A. 25.

A. "Unreasonable Application" Standards

When evaluating whether a state court's application of clearly established federal law is reasonable, AEDPA demands a context-specific examination of the record that was before the state court. *Holland v. Jackson*, 124 S. Ct. 2736, 2337-38 (2004) (per curiam) ("we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it"); *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court").

This Court's examination of the record in *Wiggins v. Smith*, 539 U.S. 510 (2003), is instructive. After concluding that the Maryland Court of Appeals had correctly identified *Strickland v. Washington*, 466 U.S. 668 (1984), as the controlling Supreme Court precedent, the Court turned to the factual record that was before the state court and conducted its own analysis of the merits. 539 U.S. at 523. The Court concluded that it was unreasonable for the Maryland Court of Appeals to have "assumed that because counsel had *some* information with respect to petitioner's background . . . they were in a position to make a tactical choice not to present a mitigation defense." *Id.* at 527 (original emphasis) (citations omitted). In reaching this conclusion, the Court emphasized that the Court of Appeals "did not conduct an assessment" of the decision by counsel to stop investigation as evidenced in the record, but merely assumed that the investigation was adequate.

Id. Additionally, the Court of Appeals was objectively unreasonable because its decision relied on an erroneous factual finding. *Id.* at 529.

As discussed further below, similar to the Maryland Court of Appeals in *Wiggins*, the California Supreme Court here made assumptions about the effect of the prosecutor's erroneous legal argument without conducting an appropriate assessment of the actual record before it. The court's failure to consider the significance of the type of evidence presented by Payton, and its difference from that presented in *Boyde*, was objectively unreasonable. The court's failure to identify that the trial court permitted the parties to argue the law is a factual omission tantamount to error and objectively unreasonable. The court's failures to assess the impact of both the prosecutor's repeated misstatements of law and the court's rulings forcing the jury to decide whether it could consider Payton's evidence as a matter of law were also objectively unreasonable. The court's decision is particularly unreasonable because of its failure to consider the totality of the pertinent facts in the record.

B. The State Court's Reliance on *Boyde* as Dispositive of Payton's Challenge is an Unreasonable Application of *Boyde*, *Skipper*, *Penry*, *Eddings* and *Lockett*

The California Supreme Court's rote application of *Boyde* to resolve Payton's challenge was objectively unreasonable because it failed to consider significant differences between the two cases.

1. The Nature of the Mitigating Evidence

The state court opinion accurately describes Payton's mitigating evidence but does not recognize the difference between the nature of Payton's mitigation and the nature of Boyde's mitigation. P.A. 159-65.[5]

Boyde presented pre-crime evidence of his impoverished childhood and disadvantaged background. In rejecting Boyde's claim that the instruction did not advise the jury to consider such non-crime related evidence, this Court saw "no reason to believe that reasonable jurors would resist the view, 'long held by society' . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." 494 U.S. at 382 (original emphasis).

The nature of the evidence presented by Payton is critically different from that presented by Boyde. Payton's evidence of his post-arrest religious conversion and good behavior in jail did not even exist at the time of the crime and, as the Ninth Circuit noted, cannot "extenuate the gravity of the crime" under a natural reading of factor (k). P.A. 16-17. Payton's evidence, unlike Boyde's, did not explain why or how he had become the person he was at the time of the capital crime. Payton "relied on evidence of his behavior *after* commission of the crime, arguing in essence that *despite* the gravity of the crime he committed, he was nevertheless 'worth saving.'" P.A. 181 (original

[5] As Justice Kennard noted in her dissent in the state court opinion (which was joined by Justice Mosk), one of the important factors cited by *Boyde* in support of its holding was the type of mitigating evidence presented by the defendant. P.A. 181; *Boyde*, 494 U.S. at 383-85.

emphasis). Payton's evidence does "not relate specifically to [his] culpability for the crime he committed." *Skipper*, 476 U.S. at 4.

The state court's reliance on *Boyde* coupled with its failure to consider the difference in the nature of the evidence presented here, and the resulting effect on the jury, is particularly unreasonable given that *Boyde* explicitly distinguished Boyde's character and background evidence from evidence that "pertain[s] to prison behavior after the crime for which [the defendant] was sentenced to death, as was the case in *Skipper*." 494 U.S. at 382 n.5. The state court ignored the distinction noted by this Court and instead uncritically and unreasonably applied *Boyde*'s holding to a fundamentally different factual scenario. *Wiggins*, 539 U.S. at 520 ("a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced' ").

Ignoring the historical context of this case, the State asserts that "[t]he consideration of post-crime character evidence in determining the appropriate sentence is well rooted in contemporary standards regarding the infliction of punishment," and that the Ninth Circuit "improperly assumed" that "society would naturally consider pre-crime evidence of character and background but not post-crime character evidence such as Payton's rehabilitation." Pet. Br. at 18, 27. However, *Skipper* – the first Supreme Court case to hold that the Eighth Amendment requires juries to consider a capital defendant's post-arrest good behavior in jail as mitigating evidence – was not decided until over four years after Payton's trial. And the *Skipper* Court was not unanimous in holding that post-crime evidence was even relevant to penalty, let alone "well rooted in contemporary

standards." 476 U.S. 1, 4.[6] *Skipper* explained that evidence that a capital defendant has been a well-behaved and well-adjusted prisoner, and the favorable inferences therefrom regarding his character and probable future conduct, does "not relate specifically to [the defendant's] culpability for the crime he committed." 476 U.S. at 4. If the *Skipper* Court viewed such evidence in this fashion, it is unreasonable to conclude that Payton's jury had any other view, especially in light of the prosecutor's argument that it could not consider Payton's evidence because it was not a "circumstance which extenuates the gravity of the crime."

2. Counsel's Conflicting Arguments

In reaching its holding, *Boyde* emphasized its agreement "with the Supreme Court of California, which was without dissent on this point, that '[a]lthough the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered.' " 494 U.S. at 385. The state court unreasonably applied federal law by failing to properly analyze the effect of the repeated arguments of Payton's prosecutor that the jury could not consider Payton's mitigating evidence.

The state court recognized that the prosecutor's argument was incorrect, P.A. 159-60, but concluded that any impact the argument may have had was "immediately

[6] Although the Court was unanimous in holding that the evidence in *Skipper* was admissible, three justices expressly took issue with post-crime evidence's relevancy in determining penalty, finding it admissible in *Skipper* only to rebut the prosecutor's evidence and argument. *Skipper*, 476 U.S. at 9-15 (Powell, J., concurring).

blunted by defense counsel's objection" and the court's admonition that statements of counsel are not evidence but argument and are to be placed in their proper perspective. P.A. 162. The first and only time the defense objected to the prosecutor's argument was after the prosecutor's first misstatement of law, and then only outside the presence of the jury. J.A. 68-70. The court overruled the objection (also outside the presence of the jury) and never corrected or condemned the prosecutor's incorrect argument before the jury. Instead, the court told counsel that they could argue their competing views of the law to the jury, and thereby authorized the prosecutor to continue his misstatements. Immediately after the admonition, the prosecutor launched right back into his argument that the jury could not consider Payton's evidence, and he repeated that argument throughout the rest of his closing. J.A. 70. The state court improperly evaluated the impact of the prosecutor's closing argument on the jury on the basis of only one of his comments, and failed to consider the cumulative impact of all of his misstatements of law. P.A. 17; *see Williams v. Taylor*, 529 U.S. 362, 416 (2000) (state court's "obvious failure to consider the totality of the omitted mitigating evidence" involved an unreasonable application of precedent in ineffective assistance of counsel case).

In support of its conclusion that the impact of the prosecutor's argument was "blunted" by Payton's sole objection, the state court also quoted *Boyde* for the point that comments of counsel "'are likely viewed as the statements of advocates,' especially when 'billed in advance to the jury as matters of argument, not evidence.'" P.A. 162. *Boyde* explained:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, see Tr. 3933, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of law. . . . Arguments of counsel which misstate the law are subject to objection and to correction by the court. . . . And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

494 U.S. at 384 (citations omitted).

The state court failed to apply the full teaching of *Boyde* to the facts of this case. Although "arguments of counsel generally carry less weight with a jury than do instructions from the court," they carry more weight where, as here, the court does not give the jury "definitive and binding statements of law" or correct misleading arguments, but instead allows counsel to present their conflicting legal views to the jury for it to resolve. *Taylor v. Kentucky*, 436 U.S. 478, 488-89 ("arguments of counsel cannot substitute for instructions by the court").

Justice Kennard correctly analyzed the situation in her dissent:

> Despite defense counsel's objection, [the prosecutor's] argument was not corrected by the trial court, which ruled that the prosecutor and defense counsel could present *to the jury* their opposing interpretations of the scope of factor (k).
>
> The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law*, not

> of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct.

P.A. 182 (original emphasis); *see also* P.A. 21-23.

The prosecutor's argument here is analogous to telling the jury in a robbery case that the use of force or fear is not an element of the crime and that the jury can find the defendant guilty without considering that element. It would not protect the defendant's Sixth Amendment right to a jury finding on all elements to simply allow defense counsel to argue force or fear was required. Rather, when defense counsel would object, the court would correct the misstatement and admonish the jury to follow the instructions given by the court. What would be corrected as a matter of course in a run-of-the-mill criminal trial went uncorrected – indeed, was court-sanctioned – at Payton's death penalty trial.

The state court's opinion does not assess the impact of this critical aspect of the context of Payton's proceeding. It is improper to allow the jury to decide matters of law, and to decide them based on conflicting arguments of counsel. The court's admonition that comments of counsel are argument, not evidence, did nothing to help the jury decide whether the prosecutor was correct or defense counsel was. *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law. . . . When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."). The prosecutor's misleading argument was never "blunted," and the

state court's conclusion to the contrary is an unreasonable application of *Boyde*. P.A. 20; *see Wiggins*, 539 U.S. at 527-28 (finding state court objectively unreasonable in ineffective assistance of counsel case where court assumed counsel's investigation was adequate but did not conduct an assessment of whether the decision to cease all investigation demonstrated reasonable professional judgment based on the record before the court).

The state court also emphasized that "[l]ater in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." P.A. 162. The prosecutor made no such concession. At one point he did discuss how to weigh Payton's evidence, but only after he stated, again, that the evidence did not qualify for consideration under factor (k). At most, the prosecutor can be viewed as arguing a fallback position, contending that if the jury rejected his primary and repeated contention that it could not consider Payton's evidence, it should then – and only then – weigh the evidence and find it of little value. However, the prosecutor never acknowledged to the jury that it legally could consider Payton's evidence.

According to the state court, "[f]or the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison." P.A. 163. The court thought it unlikely, "as did the high court in *Boyde*, 'that reasonable jurors would believe the court's instructions transformed all of [defendant's] "favorable testimony into a virtual charade."'" P.A. 163 (*quoting Boyde*, 494 U.S. at 383).

However powerful the charade metaphor may be in *Boyde*, it lacks force here. The fact that the jurors sat through Payton's penalty presentation does not mean that they must have considered his evidence in reaching their sentencing decision. Payton's jury was presented with competing legal opinions of whether it could consider Payton's evidence, and was left by the court to decide for itself whether it could consider the evidence. Thus, in contrast to *Boyde*, Payton's jury had to answer a preliminary legal question before it weighed the aggravating and mitigating evidence to decide whether Payton should live or die: did defendant's penalty evidence even qualify as mitigating evidence that it must consider under the ambiguously worded factor (k)? Only if each and every juror answered that question "yes" were Payton's Eighth Amendment rights vindicated. There is no assurance how the jurors answered that predicate legal question, a question they should never have been allowed to consider.

Again echoing *Boyde*, the state court highlighted that "[d]efense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence." P.A. 164. Conflicting arguments without dispositive instructions hardly ensure that the jury either knew or followed the correct law. In *Boyde*, defense counsel's argument regarding consideration of the mitigating evidence was not in conflict with the prosecutor's argument. Given the conflict in arguments in this case, and the lack of conflict in arguments in *Boyde*, it was unreasonable of the California Supreme Court to hold that *Boyde* resolved the challenge in Payton's case.

Moreover, Payton's counsel was left to argue that factor (k) included his mitigating evidence despite being

"awkwardly worded." In light of the prosecutor's repeated and explicit arguments to the contrary, the court's failure to correct the prosecutor's misstatements or clarify the scope of factor (k), and the fact that the text of factor (k) more closely supported the prosecutor's view than Payton's, a reasonable jury would not have been persuaded by defense counsel's argument. *See Taylor*, 436 U.S. at 488-89 ("arguments of counsel cannot substitute for instructions by the court").[7]

[7] The California Supreme Court has often noted the absence of misleading prosecutorial argument in denying claims that former factor (k) led the jury to disregard mitigating evidence. *See, e.g., People v. Wright*, 52 Cal. 3d 367, 441, 802 P.2d 221, 276 Cal. Rptr. 731 (1991) ("'the jury was presented with "sympathy" evidence in the penalty phase . . . and the prosecutor said nothing to suggest the jury should not consider such evidence'"); *People v. Coleman*, 48 Cal. 3d 112, 156, 768 P.2d 32, 255 Cal. Rptr. 813 (1989) ("Here, the prosecutor made clear at the outset that 'the jury must consider not only the crime committed, the circumstances of the crime, but the character and background of the defendant. . . . [T]hough the prosecutor argued vigorously against the weight of that evidence as mitigation, he at no time intimated that the evidence should not be considered."); *People v. Hernandez*, 47 Cal. 3d 315, 366, 763 P.2d 1289, 253 Cal. Rptr. 199 (1989) ("while the prosecutor contested whether [defendant's mitigating] evidence merited the lesser penalty of life without possibility of parole, he never contested the jury's right or duty to consider it"); *People v. Allen*, 42 Cal. 3d 1222, 1276, 729 P.2d 115, 232 Cal. Rptr. 849 (1987) ("[s]ignificantly, the prosecutor said nothing to suggest the jury should not consider such [mitigating] evidence"). Conversely, in granting claims that former factor (k) misled the jury, the state court has emphasized the presence of incorrect prosecutorial argument. *See, e.g., People v. Davenport*, 41 Cal. 3d 247, 282, 284, 710 P.2d 861, 221 Cal. Rptr. 794 (1986) ("The district attorney argued that evidence of appellant's background could be considered as a circumstance mitigating penalty only if it bore some relationship to the crime of which he was convicted.").

3. The Instructions

The state court emphasized that, as in *Boyde*, the jury was instructed to consider "all of the evidence which has been received during any part of the trial" in determining penalty, and therefore it was unlikely the jury disregarded Payton's evidence. P.A. 163-64. However, the court omitted the very next words of the instruction, which stated that the jury could consider such evidence "except as you may be hereafter instructed." J.A. 94. This instruction was immediately followed by the list of the 11 penalty factors, including factor (k). *Id*. The jury was further instructed that, "[a]fter having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider . . . the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." J.A. 96. In the context of this case, these instructions make it more likely Payton's jury was misled, not less.

The question here was not one of argument versus evidence, but one of argument versus law. That is, whereas in a typical trial arguments of counsel try to persuade the jurors how they should view or weigh the evidence under proper legal instructions, here the arguments of counsel tried to persuade the jury which of the parties' views of the law to apply. Payton's jury was never told clearly what the law was, but rather was left to make that conclusion on its own based on nothing more than argument from counsel. Telling Payton's jury to consider "all of the evidence" was irrelevant to resolving the key question before it – deciding whether the prosecutor or defense counsel was correct in stating the law. The jury had to resolve that legal question before it could decide what "all of the evidence" even was. If the jury concluded

that the prosecutor was correct, then "all of the evidence" included none of Payton's mitigating evidence. Thus, whereas in *Boyde* other instructions made it less likely the jury was misled, here the instructions focused the jury's attention on, and compounded the harm of, the prosecutor's repeated, incorrect arguments, and made it more likely that the jury disregarded Payton's evidence. This application of *Boyde* was objectively unreasonable.[8]

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[8] Citing the Ninth Circuit dissent, the State asserts that the state court decision cannot be objectively unreasonable because seven federal judges and five state justices rejected Payton's claim, while "only" six federal judges accepted it. Pet. Br. at 15 & n.7, 41. This Court rejected such a rote "counting" theory of AEDPA in *Williams v. Taylor*, 529 U.S. at 409-10. *Williams* rejected a Fourth Circuit rule that a state decision could be deemed "unreasonable" only if the state court "applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" *Id*. at 409. The Court also criticized a Fifth Circuit opinion which held that a "state court's application of federal law was not unreasonable because the Fifth Circuit panel split 2-1 on the underlying mixed constitutional question." *Id*. at 409-10.

Williams held that a state court's denial of a capital habeas petitioner's ineffective assistance of counsel claim was an unreasonable application of federal law even though all seven of the state justices and three of the four federal judges who previously considered the claim had rejected it. 529 U.S. at 370-74, 390-400; *Williams v. Warden*, 487 S.E.2d 194 (Va. 1997); *Williams v. Taylor*, 163 F.3d 860, 862 (4th Cir. 1998). Similarly, in *Wiggins*, the Court granted an ineffective assistance claim under §2254(d)'s "unreasonable application" prong where 10 of the 11 judges who had previously considered the claim denied it. 539 U.S. 510; *Wiggins v. State*, 724 A.2d 1 (Md. 1999); *Wiggins v. Corcoran*, 164 F. Supp. 2d 538 (D. Md. 2001); *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002).

III. THE ERROR WAS NOT HARMLESS

The Ninth Circuit correctly held that the constitutional error "was not harmless because it had a 'substantial and injurious effect or influence' on the jury's verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and [the court was] left with 'grave doubt' as to the harmlessness of the error, *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)." P.A. 25. The State does not challenge this holding.

As shown above, although "[t]here is no question that this was a brutal crime," there is a reasonable likelihood that the jury concluded that it could not consider the only mitigating evidence offered by Payton. P.A. 28, 29. If the jury believed it could not consider Payton's mitigating evidence, and it gave any weight to the prosecution's evidence in aggravation (which included the circumstances of the capital crime), it was required to vote for death. J.A. 96 (jury was instructed that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death"). An error that results in the jury not considering a capital defendant's entire case in mitigation cannot be harmless. *Skipper*, 476 U.S. at 8 ("it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error."); *Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir. 2000) (erroneous penalty phase instruction not harmless where "[t]he instruction was not only unconstitutionally misleading, it undermined the very core of [the capital defendant's] plea for life").

The harm was magnified by the prosecutor's argument to the jury that Payton would rape and kill again if he was not sentenced to death, but that the jury could not legally consider Payton's evidence suggesting that he would lead a constructive life if he was sentenced to life in prison. *Skipper*, 476 U.S. at 8 (exclusion of evidence that capital defendant was a good prisoner was not harmless where "[t]he prosecutor himself, in closing argument, made much of the dangers [defendant] would pose if sentenced to prison, and went so far as to assert that [defendant] could be expected to rape other inmates"); *Coleman*, 210 F.3d at 1051 ("[t]he prosecutor's closing argument exacerbated the impact of the misleading instruction by emphasizing the threat [the capital defendant] posed to the general public"); *Jones v. Dugger*, 867 F.2d 1277, 1280 (11th Cir. 1989) (exclusion of testimony of capital defendant's sister that defendant was "'a very nice person'" and "model prisoner" not harmless).

Further, "[i]n reviewing death sentences, [this] Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." *Mills v. Maryland*, 486 U.S. 367, 376 (1988). That certainty is lacking here, and Payton is entitled to a penalty retrial to avoid the "'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Penry*, 492 U.S. at 328. "'When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" *Id.*

CONCLUSION

For all of the above reasons, this Court should affirm the judgment of the Ninth Circuit.

Dated: September 27, 2004

Respectfully submitted,

ROSALIE L. RAKOFF
A Professional Corporation

MARIA E. STRATTON
Federal Public Defender
DEAN R. GITS
MARK R. DROZDOWSKI
KIM SAVO
Deputy Federal Public Defenders

Counsel for Respondent
William Charles Payton

(8)

No. 03-1039

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MELISSA A. MANDEL
Deputy Attorney General
A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2220
Fax: (619) 645-2191
Counsel for Petitioner

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ON WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR PETITIONER

As demonstrated in the State's opening brief, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires deference to the California Supreme Court's decision affirming Payton's death penalty because the California Supreme Court reasonably applied *Boyde v. California,* 494 U.S. 370 (1990), in finding that: (1) factor (k), on its face, directed the jury to consider Payton's mitigating character evidence of remorse and rehabilitation; and (2) there was no reasonable likelihood the prosecutor's misstatement concerning factor (k) misled the jury into believing it was precluded from considering Payton's evidence in deciding whether to impose life or death.

Payton's brief is notable, not for what it says, but for what it does not say. At no point does Payton address: (1) *Boyde's* holding that factor (k) is facially unambiguous and directed the

jury to consider non-crime related mitigation evidence such as background and character; (2) that no other decision, until the Ninth Circuit's in this case, had drawn a pre- and post-crime distinction concerning *Boyde's* holding that factor (k) facially directed consideration of non-crime related mitigation evidence such as background and character; or (3) the State's arguments demonstrating that the California Supreme Court's application of *Boyde* and its construction of factor (k) "standing alone" and in "the context of the proceedings" are consistent with numerous decisions of other courts, including this Court. Each of these points confirms the reasonableness of the California Supreme Court's decision and hence entitles the decision to deference under AEDPA.

What Payton's brief does say fails to establish that the California Supreme Court unreasonably applied *Boyde*. Payton properly distances himself from the Ninth Circuit's errant pronouncement that "*Boyde* does not control." Payton recognizes that the California Supreme Court reasonably relied on *Boyde*. His argument instead rests on three other fallacies that the Ninth Circuit had adopted. The first fallacy is that at the time of Payton's trial there was "no long held" societal belief that remorse or rehabilitation were relevant to culpability for purposes of sentencing. Payton maintains that the concept did not develop until this Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986). The second fallacy is that factor (k), "naturally read," applied only to evidence related to "the commission of the crime," as opposed to "any other circumstance" that would counsel, in the appropriate circumstances, for a sentence less than death. The third fallacy is that the California Supreme Court, in applying *Boyde*, "failed to" consider the factual differences between the two cases or "the totality of the pertinent facts in the record."

As demonstrated in the State's opening brief and here, post-crime remorse and rehabilitation are an aspect of an offender's character that society has long considered in assessing culpability for purposes of punishment. *Boyde*

confirmed that factor (k) did not limit a jury's consideration of mitigation to circumstances related to the crime, but rather included circumstances of the offender such as his character and background. And the California Supreme Court considered all relevant facts and therefore reasonably applied *Boyde's* holding and principles in affirming Payton's death penalty judgment.

Payton's approach is akin to that of the Ninth Circuit; he examines the issue *de novo* and substitutes his own analysis without any of the mandated deference to the reasoned California Supreme Court decision. The California Supreme Court decision finding there was no reasonable likelihood the jury misunderstood factor (k) so as to preclude consideration of Payton's mitigating evidence was not only reasonable but correct. The Ninth Circuit's grant of habeas relief as to the penalty phase should be reversed.

A. The California Supreme Court Reasonably Found That *Boyde's* Holding That Factor (k), On Its Face, Called For Consideration Of Background And Character Evidence Applied Equally To Payton's Mitigating Character Evidence

As demonstrated in the State's opening brief, this Court in *Boyde* held that factor (k), on its face, comported with the Eighth Amendment's requirement that a sentencer be permitted to consider and give effect to any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death. *Boyde*, 494 U.S. at 378, 381-82; Pet. Br. 23-24. In doing so, the Court rejected Boyde's argument that factor (k) limited the consideration of mitigating evidence to circumstances *related to the crime* as opposed to *non-crime related* factors such as a defendant's background and character. *Id.* at 378, 382.

In his brief, Payton, like the Ninth Circuit majority, does not address this aspect of *Boyde's* holding. He instead argues

that at the time of his penalty trial in 1981, the law concerning what a jury was required to consider for purposes of capital sentencing was so unclear that regardless of what this Court said factor (k) meant when it construed it in *Boyde*, a jury at the time of Payton's sentencing would not have known it could consider Payton's post-crime character evidence of remorse and rehabilitation. Resp. Br. 18, 33-35. Payton also contends that factor (k), "naturally read," refers to circumstances related to the crime. Resp. Br. 24, 33. As demonstrated in the State's opening brief, he is incorrect on both counts. Consideration of post-crime character evidence of remorse and rehabilitation was and is an inevitable sentencing consideration. And, as this Court held in *Boyde*, factor (k) does not limit a jury's consideration of mitigation evidence to circumstances related to the crime; it includes non-crime related evidence such as background and character, which is precisely what Payton presented.

1. Post-Crime Character Evidence Of Remorse And Rehabilitation Is An Inevitable Sentencing Consideration

Payton's evidence of remorse and rehabilitation is character evidence that, in appropriate circumstances, would counsel imposition of a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 594, 604-05 (1978); *Skipper*, 476 U.S. at 4-9; *see generally*, Jeffrie G. Murphy, *Repentance, Punishment, and Mercy, in Repentance: A Comparative Perspective* 143, 157 (Amitai Etzioni & David E. Carney eds., 1997) ("The repentant person has a better character than the unrepentant person, and thus the repentant person–on this theory–simply deserves less punishment than the unrepentant person."); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1604-05 (1998) ("[I]f jurors believed that the defendant was sorry for what he had

done, they tended to sentence him to life imprisonment, not death.").[1/]

Jurors need not be versed in federal Constitutional law to apply a lesson ingrained since early childhood. Indeed, it is reasonable to assume that most juries to this day remain unaware of *Skipper, Boyde* or any of this Court's jurisprudence concerning what the Eighth Amendment requires in determining a sentence in a capital case. However, a juror at the time of Payton's trial and now would bring with him or her one of the earliest lessons of childhood, that remorse and prospects for rehabilitation may justify more lenient punishment. Every child learns by the time of kindergarten that an early apology will lessen the seriousness of a transgression and often lead to a reduced punishment. A punch in the nose followed by "I'm sorry," is far less grievous than the same act followed by silence. The concepts of remorse and repentance as relevant considerations in determining an appropriate punishment are imbued in our social fabric.

In an extensive study of the role of remorse in capital sentencing, Professor Theodore Eisenberg of Cornell School of Law confirmed what common sense tells us: even where remorse is not identified in the sentencing instructions as a mitigating factor jurors naturally consider a defendant's remorse when considering the appropriate punishment. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in*

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1. As noted by Eisenberg, remorse may mitigate punishment in two ways. On the one hand, "its mitigating effect may be freestanding. On this account, remorse is the proper moral response to one's wrongdoing, and wrongdoers who experience remorse possess a quality of character that jurors rightly consider in mitigation." Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*,83 Cornell L. Rev. at 1604-05. On the other hand, remorse's mitigating effect may be derivative. "On this account, remorse is mitigating because it serves as evidence that the defendant, having made his first step on the way to rehabilitation, is less likely to be dangerous in the future." *Id.* at 1605.

Capital Sentencing, 83 Cornell L. Rev. at 1604-05 & n.25.[2/] Any jury interpreting California's instructions concerning the factors to be considered when determining punishment would have necessarily viewed those instructions in light of these common lessons learned from early childhood. Payton and the Ninth Circuit therefore incorrectly distinguish *Boyde* on the ground that, in contrast to pre-crime background evidence, there was no view, "long held by society," that post-crime character evidence can have a mitigating effect on sentencing.

Payton is also incorrect when he asserts that the law on this issue was unclear at the time of his sentencing. Resp. Br. 18. At the time of Payton's penalty trial, both federal and California law unquestionably called for the consideration of an offender's background and character and that consideration necessarily included the offender's post-crime character evidence of remorse and rehabilitation. In *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. The Court did not distinguish between pre- and post-crime character evidence. *Id.* at 594.

Payton mistakenly asserts that "*Lockett-type* evidence" was limited to "mitigating evidence that existed at the time of, and related to, the offense." Resp. Br. 20. In fact, Lockett's character evidence included post-crime acts such as a psychologist's positive "prognosis for rehabilitation if returned to society" and successful drug treatment. *Lockett*, 438 U.S. at 594. Thus, contrary to Payton's assertion, federal law at the time of Payton's sentencing did not distinguish between pre-

2. In footnote 25, Eisenberg cites an article from 1979 by Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L. Rev. 331, 356 (1979), which reminded defense counsel of the importance of a defendant's remorse to juries.

and post-crime character evidence when holding that character evidence is relevant and cannot be precluded from a capital sentencing decision.

California law at the time of Payton's sentencing similarly allowed for the consideration of a defendant's background and character for capital sentencing. Cal. Penal Code § 190.3 ("In the proceedings on the question of penalty, evidence may be presented by . . . the defendant as to any matter relevant to . . . mitigation, and sentence including, but not limited to . . . the defendant's character, background, history, mental condition and physical condition."), *reprinted in* Pet. App. 187. Section 190.3(k), from which Payton's factor (k) instruction was taken verbatim, was the embodiment of that principle. *People v. Frierson*, 25 Cal. 3d 142, 178, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (plurality) (construing "any other circumstance which extenuates the gravity of the crime" as an open-ended, catchall provision, allowing the jury's consideration of any mitigating evidence); *People v. Murtishaw*, 48 Cal. 3d 1001, 1033, 773 P.2d 172, 258 Cal. Rptr. 821 (1989) (same).[3/] Consistent with this Court, California also did not distinguish between pre- and post-crime character evidence. *See, e.g.*, *People v. Hernandez*, 47 Cal. 3d 315, 355, 363, 365-67, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) (defendant's character evidence, which included difficulty of life in prison, remorse and possibility of positive contribution in prison, fell within factor (k)); *People v. Gonzalez*, 51 Cal. 3d 1179, 1204, 1224-25, 1231-32, 800 P.2d 1159, 275 Cal. Rptr. 729 (1991) (defendant's character evidence included remorse).

Skipper, decided after Payton's sentencing, only reinforced the accepted notion that character evidence, whether pre- or post-crime, was a relevant and inevitable sentencing

3. Ironically, the defense bar initially challenged factor (k) as violative of *Furman v. Georgia*, 408 U.S. 238 (1972), because "it is so broad as to confer, in effect, unbridled discretion on the trier of fact with regard to penalty." *People v. Frierson*, 25 Cal. 3d at 142.

consideration. Indeed, the Court in *Skipper* expressly rejected the very argument advanced by Payton (Resp. Br. 23-24, 33) and the Ninth Circuit (Pet. App. 15-16), that pre-crime character evidence relates to an assessment of defendant's culpability for purposes of sentencing but post-crime character evidence does not. In *Skipper*, the State of South Carolina argued that past behavior in prison bears on a defendant's character and, therefore, is relevant evidence in determining the appropriate penalty, but that future adaptability to prison is irrelevant because it does not bear on a defendant's character, prior record, or the circumstances of the offense. *Skipper*, 476 U.S. at 6-7. This Court held: "This distinction is elusive. As we have explained above, a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7;[4] *see also*, *Johnson v. Texas*, 509 U.S. 350 (1993) (Rejecting the petitioner's argument that consideration of future behavior is not the same thing as an assessment of moral culpability for the crime already committed; "Contrary to petitioner's suggestion, however, this

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4. Pointing to the concurring opinion (Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist), Payton suggests that *Skipper* effected a sea change in the law. Resp. Br. 35 & n.6. The concurrence did question the mitigating effect of being a model prisoner, stating that "[s]ociety's interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence." *Skipper*, 476 U.S. at 14. But as the majority of this Court recognized in both *Lockett* and *Skipper*, society's interest in retribution is lessened, in appropriate circumstances, when a brutal murderer is remorseful and shows prospects for rehabilitation. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. at 1605 n.22 (citing Jeffrie G. Murphy, *Repentance, Punishment, and Mercy, in Repentance: A Comparative Perspective* at 157 (Explaining that remorse mitigates both in a deterrence framework by showing that the defendant is "less likely to commit crimes again" and in a retribution framework by showing that the defendant "has a better character.")).

forward-looking inquiry is not independent of an assessment of personal culpability."). Accordingly, at the time of Payton's sentencing, societal views and the law were in accord that an offender's post-crime character evidence of remorse and rehabilitation were relevant and inevitable sentencing considerations.

2. Factor (k) "Naturally Read" Called For Consideration of Non-Crime Related Mitigation Evidence Such As Background and Character

In his brief, Payton repeats the Ninth Circuit's argument that the words "gravity of the crime" contained in factor (k), "naturally read," refer to circumstances that relate to or ameliorate the crime itself. Resp. Br. 24, 33; Pet. App. 59 ("Most naturally read, the phrase 'extenuates the gravity of the crime' refers to evidence relating to or ameliorating the crime itself."); *see also*, Pet. App. 16 & n.9. But both flatly ignore the Court's holding in *Boyde* to the contrary.

This Court found factor (k) constitutional because, "standing alone," the instruction directed the jury to consider non-crime related evidence in mitigation, which certainly included Boyde's background and character. *See*, § A(1), *supra*, and Pet. Br. 23-24. And that specific rule is what the California Supreme Court was compelled to, and reasonably, followed. *See*, *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004) ("[T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow."). The California Supreme Court was particularly reasonable given that the only evidence presented by Payton, like Boyde, was non-crime related mitigating character evidence.

Additionally, Payton's limited interpretation of factor (k) ignores the stage of the proceedings in which the instruction is given, namely, sentencing. At a penalty trial, where the

offender has already been found *culpable* for the death qualifying murder, "gravity of the crime" reasonably refers to the defendant's culpability for purposes of *sentencing*–not, as argued by Payton and the Ninth Circuit, for the *crime*. As demonstrated here and in the State's opening brief, jurors would naturally consider a defendant's remorse and rehabilitation in determining "the gravity of the crime" for purposes of sentencing. *See*, § A(1), *supra*, and Pet. Br. 26-30.

In the final analysis, given the holding in *Boyde* and jurors' natural inclination to consider post-crime character evidence in determining the appropriate punishment, it was at least reasonable for the California Supreme Court to find that factor (k), "standing alone," applied equally to Payton's mitigating evidence. Payton, like the Ninth Circuit, is "no where close to the mark" when he argues otherwise. *Yarborough v. Alvarado*, 124 S. Ct. at 2150.

B. The California Supreme Court Reasonably Applied *Boyde*'s "Context Of The Proceeding" Analysis And Concluded There Was No Reasonable Likelihood The Jury Was Misled Concerning The Consideration Of Payton's Mitigating Evidence

Payton, like the Ninth Circuit, concedes the California Supreme Court methodically tracked and applied *Boyde's* "context of the proceedings" analysis in determining whether there was a reasonable likelihood Payton's jury misunderstood the court's instructions so as to preclude consideration of his mitigation evidence. Resp. Br. 15-17, 32-33, 35-36, 39-40. Unlike the Ninth Circuit, however, Payton also concedes (properly) that *Boyde* is the most relevant Supreme Court decision for deciding his claim. Resp. Br. 29-30. He nonetheless maintains that the California Supreme Court's application of *Boyde* was unreasonable because it was "rote."

Payton claims that the California Supreme Court's application was "rote" because it "failed to consider" "pertinent facts" in the record and "factual differences" between this case and *Boyde*. Resp. Br. 32. Payton relies on this claim to find unreasonable each application by the California Supreme of *Boyde's* "context of the proceedings" analysis: that argument of counsel carries less weight than instructions from the court, that other instructions made it even more improbable a jury would misunderstand factor (k), that correct defense argument may be considered, and that a jury would be unlikely to disregard the only evidence presented. Resp. Br. 32-40. Payton's premise is wrong, however. The California Supreme Court's opinion itself demonstrates that the court considered all of the pertinent facts.

The very "factual differences" and "pertinent facts" that Payton insists were ignored were expressly considered in the opinion. For example, the California Supreme Court expressly addressed the prosecutor's erroneous argument (Pet. App. 159-62), whether factor (k) related to the crime or included non-crime related mitigation evidence (Pet. App. 160-61), the effect of the other instructions (Pet. App. 161), and the effect of the trial court's admonition (Pet. App. 162). To the extent certain facts were not specifically addressed in the majority opinion, they were fully discussed in Justice Kennard's dissent. Indeed, Payton's brief in this regard virtually echos Justice Kennard's dissent. Compare Resp. Br. 33-44 with Pet. App. 176-85. Payton cannot seriously suggest that a state supreme court majority did not even consider the issues raised in its own dissent. This readiness to attribute error where none plainly exists is precisely the type of analysis foreclosed by AEDPA. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

Payton's analysis is also incorrect for another reason. Like the Ninth Circuit (and Justice Kennard), Payton's "context of the proceedings" argument starts with the premise that, given the alleged inadequacy of factor (k), there was no instruction directing the jury to consider his mitigation evidence. Resp. Br. 33-34, 42. As a result, he reasons, the jury was left to decide

what the law was based on the conflicting arguments of counsel. And because Payton's jurors would not naturally consider post-crime character evidence of remorse and rehabilitation, the jury necessarily adopted the prosecutor's few misstatements advising them that factor (k) did not encompass Payton's evidence. Resp. Br. 35-41. Payton is wrong in each step of his reasoning. As discussed above, factor (k) directed the jury to consider Payton's character evidence, the jury was not forced to rely on counsel's arguments, and jurors would naturally have considered remorse and rehabilitation in determining punishment. *See*, § A(1), *supra*, and Pet. Br. 23-32.

Consequently, the California Supreme Court correctly identified the issue: Is there a reasonable likelihood the prosecutor's misstatements led the jury to understand the trial court's instructions as precluding consideration of Payton's mitigating evidence? Pet. App. 161. The California Supreme Court reasonably concluded there is not. To do so, Payton's jury would have had to ignore virtually the whole penalty phase. They would have had to ignore their duty to follow the law, which they were repeatedly advised was given to them by the trial court.[5/] The jury would have had to ignore the court's instructions to consider all of the evidence, to consider "any

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5. The trial court and counsel repeatedly advised the jury, from voir dire through the penalty phase, that the trial court was the one responsible for instructing on the law and that statements of counsel were just argument, to be put in their proper perspective. *See, e.g.*, Reporter's Transcript of the trial court proceedings, Crim. No. 22151 ("RT") at 208, 346, 419, 802, 865, 928, 987, 993, 1114, 1129-30, 1141, 1242, 1306, 1794, 1832; J.A. 64, 69-70, 80-81, 85, 88. Additionally, the trial court gave the jury the following written instruction before their deliberations at the penalty phase: "Your . . . duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict. ¶ It is my duty in these instructions to explain to you the rules of law that apply in this case. You must accept and follow the rules of law as I state them to you." Pet. App. 106; Clerk's Transcript of the underlying trial court proceedings, Crim. No. 22151 ("CT") at 329 (CALJIC No. 1.00 (1979 Rev.)).

other circumstance which extenuates the gravity of the crime," and to put the prosecutor's argument in perspective. Further, the jury would have had to ignore the attention given by both parties to the value of Payton's mitigating evidence. Finally, the jury would have had to disregard their long held societal beliefs that remorse and rehabilitation are relevant mitigating factors when deciding the appropriate punishment. Under these circumstances, it is not reasonably likely a jury would have refused to consider Payton's mitigating evidence simply because the prosecutor stated that, to him, factor (k) did not mean anything that happened after the crime was committed.[6/] In this regard, it bears repeating that the relevant legal issue is the jury's understanding of the court's instructions. Payton's diversionary discussion about what transpired outside the presence of the jury between the court and counsel regarding the prosecutor's understanding of factor (k) is utterly irrelevant to the question of what the jury understood.

Lastly, the jury's questions during deliberations leave no doubt that they considered Payton's mitigating evidence. The jury asked whether "life imprisonment without the possibility of parole mean[s] under no circumstances will the defendant be paroled" and whether "future law changes affect him retroactively?" CT 441. The only basis for considering whether to keep Payton alive was his post-crime character evidence of remorse and rehabilitation. There was no mitigating evidence presented at the guilt phase. The only other evidence before the jury consisted of aggravating circumstances such as Payton's unprovoked, vicious attacks on three vulnerable people (guilt phase), his senseless and violent attack on his former girlfriend (J.A. 5-10), and Payton's uncontrollable urge to rape and stab women (J.A. 11-12). Under California's sentencing scheme the

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6. Each time the prosecutor referred to factor (k) he made it clear that he was talking about what factor (k) meant to *him*. J.A. 68, 70. This type of preface only reinforced what the jury already knew: that his argument was a statement of an advocate and not the law.

trier of fact is required to impose the death penalty where the aggravating circumstances outweigh the mitigating. Cal. Penal Code § 190.3; Pet. App. 189-90; J.A. 95-96. If Payton's jury actually believed that they were *precluded* from considering Payton's mitigating evidence then they had to impose death and there was no reason to ask their questions. They asked about the possibility of parole because they were necessarily considering Payton's mitigating evidence. Accordingly, the California Supreme Court correctly found that there is no reasonable likelihood the jury misunderstood the court's instructions so as to *preclude* consideration of his evidence.

In any event, it was at least reasonable for the California Supreme Court to so find. Unlike *Boyde's* specific holding concerning factor (k), *Boyde's* analytical framework for assessing claims that the "context of the proceedings" led a jury to misunderstand the court's instructions so as to preclude consideration of constitutionally relevant mitigating evidence is general in nature and state courts thus have a good deal of leeway in reaching reasonable outcomes. *Yarborough v. Alvarado*, 124 S. Ct. at 2149. In other words, the range of reasonable judgment is greater and entitled to more deference under AEDPA. *Id.* Given that the California State Supreme Court considered the proper factors, its decision was necessarily reasonable and entitled to deference.

C. Any Error Was Harmless

Payton also argues that any error was not harmless. Resp. Br. 44-45. Even assuming arguendo there was error, any error was necessarily harmless. Habeas relief based on trial error is available only when that error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotations and citations omitted). "This standard reflects the presumption of finality and legality that attaches to a conviction at the

conclusion of direct review. It protects the State's sovereign interest in punishing offenders and its good-faith attempts to honor constitutional rights, while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged." *Calderon v. Coleman*, 525 U.S. 141 (1998) (per curiam) (internal quotations and citations omitted).

Here, the evidence in aggravation was overwhelming. For no other reason than to quench his thirst for raping and stabbing women, Payton brutally raped and stabbed to death twenty-one year old Pamela Montgomery as she lay in her bed. P.A. 142-43. He then went to Patricia Pensinger's bedroom, a woman whom he called a friend and who had graciously allowed him into her home in the early morning hours of May 26, 1980, and stabbed her about the face, neck and back forty times. P.A. 141-42. Despite her pleas to spare her son, Payton also wielded his knife on her ten year old son Blane.[7] He inflicted twenty-three stabs wounds to Blane's face, neck and back. P.A. 141-42. He did not stop his attack until it appeared that help was on the way. P.A. 142. Payton then fled and was eventually caught in Florida a month later. P.A. 142-43; RT 1731-34 (California police arrested Payton in Florida on June 25, 1980).

Payton did not suffer from a mental illness or a troubled childhood. Nor was he a generally good person who did one heinous act out of character. He was also ably defended by competent counsel. As noted by the dissent in this case, "[o]n this record, the jury could easily find that William Charles Payton was a vile human being who chose a despicable path in life that culminated in a series of heinous crimes on the morning of May 26, 1980." P.A. 43.

Additionally, there is no question the jury heard Payton's mitigating evidence and that jurors naturally consider remorse and rehabilitation in determining sentencing regardless of the instructions. *See*, § A, *supra*. Nevertheless, the jury could have

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7. This is the correct spelling of Blane's name. It has been misspelled as "Blaine" in various pleadings and opinions.

reasonably doubted the sincerity of Payton's remorse and rehabilitation given it did not occur until after he was caught and arrested a month later while living in Florida. Even if they concluded Payton was sincere, the mitigating effect of his belated remorse and rehabilitation was insignificant in relation to the acts that he committed. Under these circumstances, any error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 637.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Dated: October 27, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MELISSA A. MANDEL
Deputy Attorney General

A. NATALIA CORTINA
Deputy Attorney General
Counsel of Record
Counsel for Petitioner

MOTION FILED
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(3)

No. 03-1039

IN THE

Supreme Court of the United States

THOMAS GOUGHNOR,
Acting Warden, California State Prison at San Quentin,
Petitioner,

vs.

WILLIAM CHARLES PAYTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: chuckhob@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1) What is the proper approach under 28 U. S. C. § 2254(d) for evaluating the use of analogous Supreme Court opinions by state courts?

2) Is a state court opinion an unreasonable application of clearly established law when it relies on a Supreme Court opinion much closer to the facts of the case than any other clearly established Supreme Court precedent to affirm the sentence?

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Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation* respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim

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* This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the all too familiar problem of a federal habeas court failing to accord the appropriate deference due to a state court opinion under 28 U. S. C. § 2254(d). The Ninth Circuit dismissed the California Supreme Court's opinion affirming Payton's sentence because it relied on *Boyde* v. *California*, 494 U. S. 370 (1990), the closest Supreme Court decision to the facts of the case, due to a handful of factual differences between the two cases. In essence, the Ninth Circuit held that reasoning by analogy was unreasonable in this case. This is contrary to the intent of Congress, the integrity of state court convictions, and the principle that the state courts and lower federal courts are coequal interpreters of the federal Constitution. It transforms § 2254(d)'s highly deferential standard into virtual de novo review. Therefore, overturning this decision is consistent with the interests of justice and public safety that the CJLF seeks to advance.

August, 2004

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

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THOMAS GOUGHNOR,
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WILLIAM CHARLES PAYTON,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

On May 26, 1980, at around 4:00 a.m., Patricia Pensinger, was sitting in her kitchen working on a crossword puzzle because she was unable to sleep. *People* v. *Payton*, 3 Cal. 4th 1050, 1057, 839 P. 2d 1035, 1039 (1992). She lived at home with her three sons and some boarders. Pensinger heard someone entering the front door, and found William Charles Payton, who said he had car problems and wanted to talk to her. See *ibid.* Payton and his wife were once boarders in the house. See *ibid.* While they talked, Pamela Montgomery entered the kitchen and was introduced to Payton. Payton had about three beers during the conversation. At around 4:50 a.m., Payton asked if he could sleep on the couch. Pensinger agreed and then went to sleep in her bedroom. See *ibid.*

Payton later went to Pensinger's bedroom and attacked her with a knife, repeatedly stabbing her in the face and neck. See

ibid. Her 10-year-old son, Blaine, tried to protect his mother, but he was also stabbed by Payton. Pensinger yelled, " 'Take me, leave my son.' " Payton tried to stab Pensinger in the abdomen but the knife was bent, so he left the room, yelling, " 'I'm leaving now.' " *Ibid.* Pensinger then told her son that she would distract Payton and that he should try to escape. She went to the kitchen and found Payton, who had found a second knife and began stabbing her again. Payton finally fled when another of Pensinger's sons woke up and she yelled for him to wake up a male boarder. See *ibid.*

"Patricia suffered 40 stab wounds to her neck, back, and chest. Blaine suffered 23 stab wounds to his face, neck, and back. Both survived." *Ibid.* Pamela Montgomery was found in her bedroom, where she had been raped and murdered. She had "12 stab wounds, including 6 in line from her stomach to her pubic area." *Id.*, at 1058, 839 P. 2d, at 1039. Saliva and semen that could have been Payton's were found on Montgomery's body. Payton's fingerprint was found on a bottle of beer in the kitchen. *Id.*, at 1058, 839 P. 2d, at 1039-1040. Payton's wife testified that he had come home at 6:15 a.m. covered with blood. *Id.*, at 1058, 839 P. 2d, at 1040. When Payton took his clothes off, his wife noticed that his genital area was covered with blood, as were his legs and other parts. *Ibid.* Payton also confessed to the crime to an inmate at the Orange County jail. See *ibid.*

Payton was convicted of first-degree murder, rape, and two counts of attempted murder. The jury also found the special circumstance that the murder was committed during a rape. See *id.*, at 1056, 839 P. 2d, at 1038-1039. At the penalty phase, the defense presented evidence that since his arrest and custody in jail he had become a deeply committed Christian. See *id.*, at 1059, 839 P. 2d, at 1040. A deputy sheriff testified that he led Bible study classes in jail, and four inmates testified about Payton's beneficial influence. See *ibid.*

California's death penalty law lists a variety of mitigating factors for the sentencing jury to consider, including what is

called "factor (k)," which reads: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code § 190.3(k). "The trial court refused the defense counsel's request to modify the instruction to refer specifically to 'evidence of the defendant's character background, history, mental condition and physical condition.' " *Payton*, 3 Cal. 4th, at 1069, 839 P. 2d, at 1047. While it agreed with defense counsel that factor (k) allowed the jury to consider such evidence, the court did not wish to vary the standard instruction from the exact words of the statute. See *ibid.*

"During closing argument, the prosecutor incorrectly argued that factor (k) referred to 'some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did' but not 'to anything after the fact or later.' " *Ibid.* At another point, the prosecutor stated: " 'What I am getting at, you have not heard during the last few days any legal evidence of mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.' " *Payton* v. *Woodford*, 346 F. 3d 1204, 1209 (CA9 2003) (en banc). At the conclusion of the argument, "the prosecutor told the jury that he did not 'want to spend too much time on [Payton's religious conversion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors.' " *Ibid.*

Defense counsel objected to the prosecution's comments about factor (k) and moved for a mistrial. The trial court denied the motion, but instructed "the jury that 'the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective.' " *Ibid.* During closing argument, defense counsel vigorously asserted that the defendant's conversion was proper mitigating evidence. See *Payton*, 3 Cal. 4th, at 1072, 839 P. 2d, at 1049.

The California Supreme Court affirmed his conviction and sentence. See *id.*, 3 Cal. 4th, at 1056, 839 P. 2d, at 1039. It rejected Payton's claim that the prosecutor's comments led the jury to think that they were not allowed to consider his mitigating evidence. See *id.*, at 1069, 839 P. 2d, at 1047. The California Supreme Court analyzed Payton's claim under this Court's decision holding that factor (k) satisfied the Eighth Amendment, *Boyde* v. *California*, 494 U. S. 370 (1990). See *Payton*, 3 Cal. 4th, at 1070, 839 P. 2d, at 1048. Applying *Boyde*, the prosecutor's remarks would be "constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court's instructions as precluding consideration of relevant mitigating evidence offered by the defendant." *Id.*, at 1070-1071, 839 P. 2d, at 1048. The court concluded that it was not reasonably likely that the jurors were misled by the prosecutor's argument. See *id.*, at 1071, 839 P. 2d, at 1048.

Payton filed a federal habeas corpus petition, and the District Court rejected his guilt phase claims but vacated his death sentence. See *Payton* v. *Woodford*, 299 F. 3d 815, 819 (CA9 2002) (en banc). A three-judge panel of the Ninth Circuit Court of Appeals reversed the District Court's penalty phase ruling. See *ibid.* Sitting en banc, the Ninth Circuit reversed the panel's ruling on the penalty phase. See *ibid.* It held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not apply to Payton's habeas claims because he filed a petition for appointment of counsel before the AEDPA took effect. See *id.*, at 822. Considering the merits *de novo*, the court divided 6-5 on whether the California Supreme Court's decision was correct. See *id.*, at 830; *id.*, at 838 (Tallman, J., dissenting). After *Woodford* v. *Garceau*, 538 U. S. 202 (2003) overturned the Ninth Circuit's rule on applicability of AEDPA in these circumstances, this Court granted certiorari, vacated, and remanded for reconsideration in light of *Garceau*. See *Woodford* v. *Payton*, 538 U. S. 975 (2003).

On remand, the Ninth Circuit again vacated the death sentence in an en banc ruling. It held that the California Supreme Court's reliance on *Boyde* was an unreasonable application of this Court's precedent because "*Boyde* did not directly address the question here—whether on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to *post-crime* evidence." *Payton*, 346 F. 3d, at 1212 (emphasis in original). The en banc court held that the California Supreme Court's conclusion under *Boyde*, that there was not a reasonable likelihood that the jury was misled, was an unreasonable application of clearly established United States Supreme Court precedent.

This Court granted certiorari on May 24, 2004.

SUMMARY OF ARGUMENT

This case demonstrates the importance of determining the appropriate level of specificity for the relevant clearly established law in § 2254(d) analysis. Normally, defining the relevant body of clearly established law at a high level of abstraction should favor deference to the state court decision. However, where there is a close, but distinguishable, Supreme Court precedent that supports the state court decision, then defining the law at a very general level can defeat § 2254(d)'s deferential standard. This is what the Ninth Circuit did in the present case.

A state court's decision to follow a close Supreme Court precedent is usually reasonable. In *Lockyer* v. *Andrade*, the case before the state court was between two Supreme Court precedents. The state court chose the precedent that supported affirming the sentence, and this Court held it reasonable under § 2254(d). This illustrates how a federal habeas court is supposed to give the benefit of the doubt to the state court opinion. Allowing state courts to apply analogous cases is part of that deference.

It was reasonable for the California Supreme Court to rely on *Boyde* v. *California* by analogy. The two cases have considerable similarities: they both analyzed the same instruction, in each case the defendant's entire mitigation case consisted of non-crime evidence, the prosecutor implicitly conceded that the jury would weigh the aggravating and mitigating evidence in both, the court instructed the jury to consider all the evidence in each case, and in both cases defense counsel argued that the jury can consider the mitigating evidence under factor (k).

The differences in time and context do not change the result. While *Boyde* did not address whether post-crime evidence can be considered under factor (k), it recognized that the instruction's language is naturally broad. Factor (k)'s language allows jurors to consider non-crime evidence like Payton's conversion to Christianity.

The effect of the prosecution's comments in the closing argument is no different. The Ninth Circuit's assertion that only judicial instruction can counteract improper comments by counsel is contradicted by *Boyde* and other decisions. What matters is the context of the entire trial, which in this case neutralizes any adverse influence of the prosecutor's comments.

The California Supreme Court's decision satisfies § 2254(d). The case for reasonableness is even stronger here than in *Andrade*. While that decision involved a case between two Supreme Court precedents, the present case is far closer to *Boyde* than any other Supreme Court precedent. This is exactly the type of decision Congress meant to protect when it passed § 2254(d).

ARGUMENT

I. A state court's decision to rely on a distinguishable, but analogous, Supreme Court decision can be reasonable under 28 U. S. C. § 2254(d).

This case demonstrates that the best intentioned rule cannot achieve what its authors desire if it is improperly implemented. The Ninth Circuit's difficulty with implementing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is known to this Court. See, *e.g.*, *Yarborough* v. *Alvarado*, 541 U. S. __, 158 L. Ed. 2d 938, 124 S. Ct. 2140 (2004); *Yarborough* v. *Gentry*, 540 U. S. 1 (2003) (*per curiam*); *Woodford* v. *Garceau*, 538 U. S. 202 (2003); *Lockyer* v. *Andrade*, 538 U. S. 63 (2003); *Early* v. *Packer*, 537 U. S. 3 (2002) (*per curiam*). This case involves the Ninth Circuit's refusal to defer to the California Supreme Court opinion simply because California's high court relied on a decision from this Court that is much closer than any other Supreme Court precedent, but still partially distinguishable from the present case. The Ninth Circuit's opinion misstates this precedent and improperly declares the California high court's opinion unreasonable because it reasoned by analogy.

The primary problem with the Ninth Circuit's decision is its emphasis on elevating this Court's more general Eighth Amendment decisions at the expense of the decision which is the closest to the facts of the present case. Its decision to rely on *Lockett* v. *Ohio*, 438 U. S. 586 (1978) and other cases establishing the general right to have the sentencer consider the relevant mitigating evidence improperly discounts the much more relevant decision of *Boyde* v. *California*, 494 U. S. 370 (1990). By focusing on the more general precedent, while distinguishing *Boyde*, the Ninth Circuit effectively substituted its opinion of the Eighth Amendment for the California Supreme Court's. The existence of factual differences with a Supreme Court opinion does not render that opinion irrelevant

under § 2254(d). What matters is the degree of difference and how the opinion is used.

Any approach to determining the appropriate level of abstraction under § 2254(d) should be tailored to the special characteristics of that deferential standard. Section 2254(d) establishes a two-step test for determining whether the state court properly identified the controlling Supreme Court precedent and applied it in an objectively reasonable manner. See *Price* v. *Vincent*, 538 U. S. 634, 640-641 (2003). Since § 2254(d) governs federal review of state court interpretations of the relevant clearly defined law, defining the law at a relatively high level of abstraction actually increases the likelihood of deferring to the state court judgment when the test is applied correctly. See *Alvarado*, 158 L. Ed. 2d, at 951, 124 S. Ct., at 2149.

However, if a habeas court does not apply the appropriate deference to the state court opinion, then defining the relevant law at a high level of abstraction can make it easier to grant habeas in some cases. If there is a Supreme Court opinion much closer to the facts of the case than any other decision of this Court, and that decision supports the result in the state court opinion, the habeas court will have to distinguish that case before it can grant habeas under § 2254(d). Defining the relevant clearly established law at a high level of generality allows the habeas court to bypass the more specific decision. If the habeas court then does not apply the appropriate deference to the state court opinion, it is actually easier to disagree with the state court opinion at this higher level of abstraction. This is what the Ninth Circuit did in this case, and it is inconsistent with this Court's application of § 2254(d).

Alvarado affirms that habeas courts must pay attention to the level of specificity of the governing Supreme Court precedent under § 2254(d). That case addressed whether the state court acted unreasonably in holding that the defendant was not in custody for the purpose of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Alvarado*, 158 L. Ed. 2d, at 946, 124 S. Ct., at

2144. The Ninth Circuit held that the state court decision was an unreasonable application of Supreme Court precedent because it failed to take into account the defendant's juvenile status and lack of prior history of arrest or interrogation when determining the custody question. See *id.*, at 949, 124 S. Ct., at 2147. It concluded that since juvenile status was relevant to the voluntariness of a confession or the waiver of the self-incrimination privilege, failing to apply this principle to the custody question was unreasonable. See *ibid.* In reversing this decision, this Court provided guidance for approaching the "clearly established" question under § 2254(d).

> "At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Id.*, at 951, 124 S. Ct., at 2149.

The rule governing *Miranda* custody is a general one, whether a reasonable person would feel free to leave under the circumstances of the interrogation. See *id.*, at 952, 124 S. Ct., at 2150. The Ninth Circuit's holding ignored the greater deference accorded to state courts applying general rules by attaching a more specific rule regarding juvenile status found in the law of voluntary confessions and waiver of rights that was not present in the general rules governing *Miranda* custody. However, a confession's voluntariness and the validity of a waiver contain an "important conceptual difference" from *Miranda* custody. See *id.*, at 953, 124 S. Ct., at 2151. Extending these more specific foreign concepts undercuts the more general custody inquiry. Under the circumstances

of the case, the state court's conclusion that Alvarado was not in custody was reasonable, and "[t]he Court of Appeals was nowhere close to the mark when it concluded otherwise." *Id.*, at 952, 124 S. Ct., at 2150.

Narrower precedent can be used to support convictions and sentences. A precedent can bolster the argument that the state court opinion is reasonable even if that precedent is factually distinguishable. The more favorable treatment of precedent supporting the state court decision is acceptable because § 2254(d) is meant to favor state court decisions. In § 2254(d), Congress created a "highly deferential standard for reviewing state-court rulings." *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997). If the question is unsettled, then § 2254(d) "demands that state court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*). Giving supportive precedent a more favorable treatment than precedent that is hostile to the state court opinion is consistent with the intent of Congress.

This Court has applied that principle to the badly conflicted law governing Eighth Amendment challenges to prison sentences. *Andrade*, *supra*, addressed an Eighth Amendment challenge to two consecutive 25-to-life sentences under California's Three Strikes law. See 538 U. S., at 66. The Ninth Circuit held that the state court's decision upholding the sentence was an unreasonable application of clearly established federal law. See *id.*, at 70. A major problem with this ruling was the deeply conflicted state of the precedents governing Eighth Amendment challenges to noncapital sentences. As this Court noted, "our precedents in this area have not been a model of clarity." *Id.*, at 72. Between the conflicting results in *Rummel* v. *Estelle*, 445 U. S. 263 (1980) and *Solem* v. *Helm*, 463 U. S. 277 (1983), and the lack of any majority opinion in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), there was little clearly established Supreme Court precedent, except at a very general level. "Thus, in this case, the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable

application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." *Andrade*, 538 U. S., at 73 (quoting *Harmelin*, 501 U. S., at 1001 (Kennedy, J., concurring in part and concurring in the judgment)).

Rummel and *Solem* were the cases closest to Andrade's. *Rummel* involved a life sentence for a nonviolent offender under a recidivist sentencing scheme. See 445 U. S., at 264-265. The life sentence was subject to the possibility of parole within 12 years, see *id.*, at 280-281, and was upheld against Eighth Amendment attack by this Court. See *id.*, at 285. *Solem* involved a life sentence without possibility of parole for a nonviolent offender sentenced under a habitual criminal scheme, see 463 U. S., at 279, which the *Solem* Court struck down as violating the Eighth Amendment. See *id.*, at 303.

Andrade's case implicated factors found in both *Solem* and *Rummel*. See 538 U. S., at 73. Unlike *Solem*, there was the possibility of parole for Andrade, but his 50-to-life sentence was more severe than the life with possibility of parole in 12 years in *Rummel*. Thus, Andrade's case was between the two decisions, materially distinguishable from both. See *id.*, at 73-74.

The state court opinion upholding Andrade's sentence based its holding on *Rummel*. Since *Solem* did not overrule *Rummel*, the state court decision was not contrary to the clearly defined legal principles. See *ibid.* That decision was also reasonable. Given the broad discretion to the legislature under the governing legal principles, affirming Andrade's sentence "was not objectively unreasonable . . . ." *Id.*, at 76.

Andrade demonstrates that a case can support a state court decision under § 2254(d) even though it is not precisely on point. While the case was between a Supreme Court decision affirming a sentence and one striking down a sentence, the state court's decision to follow the affirming decision, *Rummel*, was reasonable. It is true that *Andrade* was decided in a context that

was very favorable to upholding state court opinions, as the law was unclearly defined except at a very high level of abstraction, and that law was very deferential to prison sentences. Still, *Andrade* stands for the proposition that a state court can rely on a supporting opinion even if it is distinguishable from the case before it.

This reflects a common-sense approach to precedent under § 2254(d). Cases which are not distinguishable from one of this Court's precedents are easy. Section 2254(d) matters most in the grey areas between Supreme Court precedents. It is not enough for a federal court to disagree with a state court in order to grant habeas in such a case. See *Williams* v. *Taylor*, 529 U. S. 362, 411 (2000). Rather, the state court decision must be objectively unreasonable for habeas corpus to be granted. See *id.*, at 409. Where there is no contrary law on point, and there is an analogous precedent supporting a similar result, it is highly unlikely that it is objectively unreasonable to rely on the analogous precedent.

Under the AEDPA, state and lower federal courts are coequals in the development of constitutional law in criminal cases. The "primary responsibility" for applying this Court's precedents in state criminal cases is "with the state courts . . . ." *Visciotti*, 537 U. S., at 27. As this Court noted in another context, "federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 586 (1999). Under § 2254(d) state courts can make reasonable decisions on unresolved questions in constitutional criminal procedure without fear of being second-guessed by the lower federal courts. Allowing state courts to follow close, but distinguishable, Supreme Court precedent is part of that process.

There are limits to this approach. While the § 2254(d) standard is very deferential to state court rulings, it is not a blank check. A state court cannot insulate an opinion from

habeas review simply by declaring the case analogous to a Supreme Court decision affirming a conviction.

Also, this is an approach to habeas cases, not a hard and fast rule. No bright-line rule can determine with precision when a Supreme Court precedent is sufficiently similar to the state court case to satisfy § 2254(d). However, extrapolating from one analogous precedent to another case is the essence of legal reasoning. See E. Levi, An Introduction to Legal Reasoning 1-2 (1948); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 799-800 (1996) (Kennedy, J., concurring in part and dissenting in part). This common judicial function should not be difficult for courts to apply, and can help guide applications of § 2254(d).

II. It was reasonable for the California Supreme Court to rely on *Boyde* v. *California* by analogy.

The present case is before this Court because of a disagreement between the California Supreme Court and the Ninth Circuit Court of Appeals over one case. The California Supreme Court, like the Ninth Circuit, identified *Lockett* v. *Ohio*, 438 U. S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Skipper* v. *South Carolina*, 476 U. S. 1 (1986) as establishing the general principle governing Payton's Eighth Amendment claim, that the capital defendant has the right to have the jury hear and consider relevant mitigating evidence. See *People* v. *Payton*, 3 Cal. 4th 1050, 1070, 839 P. 2d 1035, 1047 (1992); *Payton* v. *Woodford*, 346 F. 3d 1204, 1210 (CA9 2003). The Ninth Circuit also identified *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) as relevant, see 346 F. 3d, at 1210, but that case is not the reason for the conflict between the two courts.

Boyde v. *California*, 494 U. S. 370 (1990) is the reason for the Ninth Circuit's decision to grant habeas corpus. In spite of the "highly deferential" standard of 28 U. S. C. § 2254(d), see *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997), the Ninth Circuit declared the California Supreme Court opinion to be an

unreasonable application of the clearly established Supreme Court precedent because it relied on *Boyde*, even though that decision is much closer to the present case than any other Supreme Court precedent. This is as inaccurate as it sounds. *Boyde* is sufficiently close to the present case to be highly relevant. The Ninth Circuit's dismissal of *Boyde*'s relevance is achieved only by misconstruing the opinion.

A. Boyde.

In *Boyde*, the defendant claimed that none of California's 11 enumerated mitigating factors allowed the sentencing jury to consider mitigating evidence that is not related to the crime, such as the defendant's background or character. See 494 U. S., at 378. The case centered on California's "catch-all" provision, "factor (k)." See *id.*, at 373-374, and n. 1.[1] The *Boyde* Court began its analysis by admitting that "[t]he legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases." *Id.*, at 378. Since it was important to set a single standard, see *id.*, at 379, the Court settled on one formula, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.*, at 380. This standard reflected a careful balancing of interests. "There is, of course, a strong policy in favor of accurate determination in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Id.*, at 380.

Factor (k) satisfied this standard. See *id.*, at 381. Character and background evidence are relevant because it has long been

1. *Boyde* also addressed a second issue, whether the "shall impose a sentence of death" language in the standard jury instruction in capital cases violated the Eighth Amendment. See 494 U. S., at 376. This Court upheld this instruction under *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990). See *Boyde*, *supra*, at 377.

held by society that criminals whose crimes are attributable to their background or mental problems are less culpable than those lacking this excuse. See *Penry*, 492 U. S., at 319. Factor (k) allows the defendant "to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime" and that the jurors would give effect to this evidence in the appropriate case. *Boyde*, 494 U. S., at 382. The instruction did not limit the jury consideration to circumstances of the crime. *Ibid.* Rather, "[t]he jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Ibid.* (emphasis in original; footnote omitted).

Even if factor (k) had been less clear, the context of the case demonstrated that a reasonable juror would consider the defendant's evidence in mitigation. See *id.*, at 383. Since all of the defense's four-day-long defense consisted of character and background evidence, it was "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.' " *Ibid.* (quoting *California* v. *Brown*, 479 U. S. 538, 542 (1987)). Also, as the jury was instructed to consider all of the evidence, it is not sensible to conclude that factor (k) would leave jurors constrained "to *ignore all* of the evidence." *Id.*, at 383-384 (emphasis in original).

The defense also claimed that the prosecutor's arguments just before the sentencing deliberation fatally undercut the strength of the factor (k) instruction. This did not change the analysis, as counsel's arguments typically carry less weight than the trial court's instructions. See *id.*, at 384. While it is possible that the prosecution's misrepresentations could have an impermissible effect on the jury, the fact remains that they have less force than instructions from the court. See *id.*, at 384-385. The *Boyde* Court analyzed the prosecutor's remarks in their context, see *id.*, at 385, and determined that they did not impermissibly alter the jury's consideration of the mitigating evidence. While the prosecution argued that the defendant's

evidence did not mitigate Boyde's crime, it never claimed that the jury could not consider this evidence. See *ibid.* The prosecution's argument implicitly recognized the relevance of the mitigating evidence and the defense argument advocated a very broad reading of factor (k). See *id.*, at 385-386. Therefore, the factor (k) instruction did not violate the Eighth Amendment. *Id.*, at 386.

B. Similarities and Differences.

1. Similarities.

There are many similarities between *Boyde* and the present case. Like *Boyde*, the present case involves California's former factor (k) instruction.[2] As in *Boyde*, the question is whether the instruction is broad enough to allow the jury to consider mitigating evidence not related to crime. See *People* v. *Payton*, 3 Cal. 4th 1050, 1069, 839 P. 2d 1035, 1047 (1992). Payton's mitigating evidence, like Boyde's, concerned his character. See *id.*, at 1059, 839 P. 2d, at 1040. In both cases, the non-crime evidence in question made up all of the defendant's mitigation case. See *id.*, at 1072, 839 P. 2d, at 1049. Payton's trial also contained an instruction that the jury consider all of the evidence. See *ibid.* His counsel argued that the jury could consider the mitigating evidence under factor (k). See *ibid.* In addition, other remarks in the prosecution's closing argument implied that the jury could weigh the defendant's mitigating evidence. See *id.*, at 1071-1072, 839 P. 2d, at 1049. Finally, both cases involved appellate attacks by the defense on the effect of the prosecution's closing argument on the jury's consideration of the mitigating evidence. See *id.*, at 1069, 839 P. 2d, at 1047.

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2. California courts are now required to specifically instruct juries that they may consider any aspect of the defendant's record or character in mitigation when applying factor (k). See *Boyde*, 494 U. S., at 374, n. 2.

2. Differences.

Boyde and the present case are not identical. The most substantial difference is the prosecutor's argument. While the argument in *Boyde* was comparatively innocuous, the prosecution misstated the law in the present case by claiming that factor (k) did not refer to any mitigating effect occurring after the crime. See *ibid.* There is also a difference between the types of mitigating evidence in the two cases. Payton's conversion to Christianity, although related to his character, took place after his crime. Payton's conversion is not part of his background, and it is not an emotional or mental state that contributed to the crime. Therefore, it differs from the mitigating evidence in *Boyde*.

a. Time.

The Ninth Circuit pounced on these two differences. First it placed a heavy emphasis on the temporal differences between the mitigating evidence in *Boyde* and the present case. See *Payton* v. *Woodford*, 346 F. 3d 1204, 1211-1212 (CA9 2003). It further concluded that *Boyde* did not address whether an unadorned factor (k) instruction allows the jury to consider post-crime mitigating evidence. See *id.*, at 1212. The Ninth Circuit also asserted that the *Boyde* "Court explicitly distinguished the character and background evidence at issue there from evidence that 'pertain[s] to prison behavior after the crime for which [the petitioner] was sentenced to death as was the case in *Skipper*.' " *Ibid.* (quoting *Boyde*, 494 U. S., at 382, n. 5). Finally, the en banc panel held that "[a]ny natural reading of the words of the unadorned factor (k) does not support the inclusion of post-crime evidence because mitigating evidence occurring after a crime cannot possibly 'extenuate the gravity

of the crime.' " *Ibid.* The Ninth Circuit therefore ruled that *Boyde* could not apply to this case. *Ibid.*[3]

This considerably overstates the differences between *Boyde* and the present case. The *Boyde* Court did not "explicitly distinguish" post-crime mitigating evidence. Boyde's counsel did not brief, but raised at oral argument, the claim that factor (k) did not allow the jury to consider that Boyde had won a dance contest while in prison. See 494 U. S., at 382, n. 5. He asserted that this would be mitigating evidence under *Skipper*. See *ibid.* The *Boyde* Court dismissed this claim for two reasons. First, the evidence was introduced as part of his artistic ability, while in *Skipper* the evidence was that the defendant was a model prisoner and therefore not a danger to the community. *Id.*, at 383, n. 5. In addition, the dance prize was won before he committed the murder, unlike the post-crime evidence in *Skipper*. *Ibid.* This evidence was therefore similar to the other character evidence presented at trial, and so it was considered by the jury. See *ibid.*

The *Boyde* Court did not distinguish its holding from post-crime evidence because that type of evidence was never presented to it. Since any statement on this issue would be no more than dicta, the *Boyde* Court wisely chose not to address an issue it did not need to face. "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas* v. *Cobb*, 532 U. S. 162, 169 (2001). The *Boyde* decision did not state that factor (k) would address post-crime evidence, nor did it say that it did not. Contrary to

3. The Ninth Circuit's opinion states that post-crime mitigating evidence is distinguishable from pre-crime evidence, because it does not share "society's 'long held' views" as to its relevance, and therefore a presumption that a jury would interpret an ambiguous instruction to permit it is not justified. See 346 F. 3d, at 1212. Strong societal consensus is the basis of mitigation being a constitutional requirement in the first place. See *Woodson* v. *North Carolina*, 428 U. S. 280, 297-301 (1976) (lead opinion). If post-crime evidence really occupies the disfavored position the Ninth Circuit claims, then *Skipper* was wrongly decided and should be overruled.

the Ninth Circuit's conclusion, footnote 5 of *Boyde* does not foreclose applying factor (k) to post-crime mitigating evidence.

The Ninth Circuit's holding that the "natural reading" of factor (k) does not include post-crime evidence substitutes assertion for analysis. The factor (k) instruction reads: "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Payton*, 3 Cal. 4th, at 1069, 839 P. 2d, at 1047. The two key terms in this provision are "any other circumstance" and "extenuates the gravity of the crime." *Boyde* found both capable of an appropriately broad application by a sentencing jury. As to the former phrase, this Court noted that "[t]he jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." 494 U. S., at 382 (emphasis in original).

Boyde's holding also prevents the second phrase from limiting factor (k)'s reach. If factor (k) does not allow the consideration of mitigating evidence, it is because the phrase "extenuates the gravity of the crime" requires the jury to tie the defendant's evidence to the crime before giving it mitigating effect. The *Boyde* Court's holding that factor (k) does not prevent the consideration of non-crime mitigating evidence, see 494 U. S., at 382, implicitly rejects this.

At trial, Boyde's "overall strategy [was] to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties." *Id.*, at 383, n. 5. This works to mitigate two of the traditional theories of punishing crime—retribution and incapacitation. The retribution theory of punishment is the notion that the criminal should be punished for harming society, see 1 W. LaFave, Substantive Criminal Law § 1.5(a), pp. 41-43 (2d ed. 2003), while incapacitation holds that the criminal is a danger to society and should therefore be separated from it. See *id.*, at 1.5(a)(2), at 38. A person whose crime is attributable in part to a disadvantaged background is less responsible for the damage done to society by the crime, and his good character

decreases the need to segregate him from society through the ultimate form of incapacitation, the death penalty. Payton's evidence is similar to Boyde's in this respect. It is evidence of his good character, which demonstrates that he is no longer so dangerous to society that he needs permanent incapacitation. His good deeds in prison help society, and thus pays back some of the damage caused by his crimes, reducing the need for retribution. These similarities make *Boyde*, and its interpretation of factor (k), highly relevant to the present case.

b. Context.

The second difference cited by the Ninth Circuit, the prosecutor's comments, is a more substantial difference. However, it does not render *Boyde* irrelevant. The prosecutor's misstatement of California law cannot be excused, but it is only one part of the larger context of the penalty phase. *Boyde* demonstrates the need to look at the entirety of the proceedings to find the proper context for the instruction. See 494 U. S., at 383. Viewed in this light, the prosecutor's argument does not create a fatally wide gap between *Boyde* and the present case.

The Ninth Circuit provided several reasons for why the prosecutor's comments in this case rendered *Boyde* irrelevant. First, it noted that the *Boyde* Court found that the prosecutor's comments did not suggest " 'an impermissible interpretation of factor (k) . . . .' " See *Payton*, 346 F. 3d, at 1212 (quoting *Boyde*, 494 U. S., at 384-385)). While true, this only demonstrates that *Boyde* and the present case are not identical. The *Boyde* opinion recognized that "prosecutorial misrepresentations" may decisively influence the jury, but "they are not to be judged as having the same force as an instruction from the court." See 494 U. S., at 384-385. While this indicates that a prosecutor's arguments generally will not negate a court's instruction to consider the evidence, the Ninth Circuit ignores this natural reading, interjecting its own startling interpretation of *Boyde*. "According to *Boyde*, only instructions by the court

have the force to 'blunt' attorneys' comments." 346 F. 3d, at 1214, n. 13.

There is no foundation in *Boyde* for this naked assertion. After noting that the prosecutor's arguments could effect the jury's consideration of the mitigating evidence, the *Boyde* Court concluded that "like the instructions of the court," the prosecution's arguments "must be judged in the context in which they are made." 494 U. S., at 385. It cites several cases in support of this point, *Greer* v. *Miller*, 483 U. S. 756, 766 (1987), *Darden* v. *Wainwright*, 477 U. S. 168, 179 (1986), and *United States* v. *Young*, 470 U. S. 1, 11-12 (1985). See 494 U. S., at 385. In *Greer*, a "single question, an immediate objection, and two curative instructions" meant that there was no due process violation for prosecutorial misconduct. See 483 U. S., at 766. *Darden* placed the prosecution's closing arguments in the context of the defense counsel's arguments preceding it, see 477 U. S., at 179, while in *Young*, the prosecution's remarks were examined in the context of defense counsel's improper remarks which invited the prosecutorial misconduct. See 470 U. S., at 11-12. As the *Young* Court noted, "the remarks must be examined within *the context of the trial* to determine whether the prosecution's behavior amounted to prejudicial error." *Id.*, at 12 (emphasis added); see also *Donnelly* v. *DeChrisotophoro*, 416 U. S. 637, 639 (1974) (determining whether "remarks, in the *context of the entire trial*, were sufficiently prejudicial to violate respondent's due process rights" (emphasis added)).

Boyde evaluated the factor (k) instruction in the context of the entire penalty phase trial. See 494 U. S., at 383-384. As noted earlier, this context is strikingly similar to that in the present case. See Part II-B-1, *supra*. Furthermore, *Boyde* evaluated the prosecutor's comments in the context of defense counsel's arguments, see *id.*, at 386, which was also done by the California Supreme Court in this case. See *Payton*, 3 Cal. 4th, at 1072, 839 P. 2d, at 1049. Finally, the *Boyde* Court also relied on the fact that the prosecution's closing argument

weighed the aggravating evidence against the non-crime mitigating evidence, which reinforced the conclusion that the jury considered this evidence. See 494 U. S., at 385-386. The prosecution made a similar argument in this case, which the California Supreme Court appropriately considered. See 3 Cal. 4th, at 1071-1072, 839 P. 2d, at 1049. The Ninth Circuit's support for its conclusions about *Boyde* would be extraordinarily weak even under the pre-AEDPA de novo standard. Under § 2254(d), its support for granting habeas is inexcusably minimal.

C. General and Specific.

The Ninth Circuit's analysis places the most relevant case in the margins. It consistently misconstrues *Boyde*, while ignoring the many similarities between it and the present case. Those cases it chooses to apply are relevant only at a much higher level of generality. *Lockett* addressed an Ohio death penalty scheme that expressly limited mitigation to three narrow circumstances: the victim inducing the offense, the defendant acting under duress or coercion, and the defendant's mental deficiency. See 438 U. S., at 607-608 (plurality opinion). *Eddings* struck down a death sentence in which the trial judge declared that under Oklahoma law he could not consider the defendant's " 'violent background.' " See *Eddings* v. *Oklahoma*, 455 U. S. 104, 112-113 (1982). In *Skipper v. South Carolina*, 476 U. S. 1 (1986), the trial court ruled that evidence of the defendant's " 'good adjustment' " to jail was inadmissible. See *id.*, at 3. The only decision relied upon by the Ninth Circuit that involved a jury instruction was *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), which held that Texas' scheme of instructing on three special issues did not allow the sentencing jury to give mitigating effect to the defendant's mental retardation and history of abuse. See 492 U. S., at 322-326. Although *Penry* did involve jury instructions, the Texas instructions are very different from California's factor (k) instruction analyzed in *Boyde* and the present case. Compare

id., at 310 (listing Texas' three special issues), with *Boyde*, 494 U. S., at 374 (factor (k)).

Boyde is much closer and more relevant to the present case than the decisions utilized by the Ninth Circuit. While these precedents do establish the general principle relevant to the present case, that the sentencer must be allowed to consider all relevant mitigating evidence in capital cases, see, *e.g.*, *Eddings*, 455 U. S., at 110, the factual differences between these decisions and the present case limit their utility to this general principle. *Boyde*, which addresses the same instruction and a similar factual context, is the most relevant decision by a considerable margin. Although there are differences between it and the present case, this does not require the conclusion that the California Supreme Court's application of *Boyde* is an unreasonable application of the more general rule.

III. The California Supreme Court's decision is a reasonable application of the clearly established Supreme Court precedent.

There is little question that the California Supreme Court correctly identified and applied the relevant legal principles clearly established by this Court. It identified the cases establishing the principle that a capital defendant is entitled to have the sentencer consider all relevant mitigating evidence. See *People* v. *Payton*, 3 Cal. 4th 1050, 1070, 839 P. 2d 1035, 1047 (1992). The case it chose to rely on, *Boyde* v. *California* 494 U. S. 370 (1990), simply applies this general principle to the factor (k) instruction that was before the California Supreme Court. See *id.* at 377; *Payton*, 3 Cal. 4th, at 1070, 839 P. 2d, at 1048. The primary question in this case is whether the California Supreme Court's application of this precedent is reasonable. The answer is yes. The Ninth Circuit's opinion "was nowhere close to the mark when it concluded otherwise." See *Yarborough* v. *Alvarado* 541 U. S.__, 158 L. Ed. 2d 938, 952, 124 S. Ct. 2140, 2150 (2004).

The reasonableness of a state court opinion under § 2254(d) begins by recognizing the habeas petitioner's heavy burden in such cases. Section 2254(d) creates a " 'highly deferential standard' " for state court opinions, see *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*), which the habeas petitioner bears the burden of overcoming. See *Price* v. *Vincent*, 538 U. S. 634, 640 (2003). Any benefit of the doubt is given to the state court decision under § 2254(d). *Visciotti*, 537 U. S., at 24.

As noted earlier, the similarities between *Boyde* and the present case overshadow the differences. See *supra*, at 16-22. There is no doubt that, consistent with *Boyde*, factor (k) covers the non-crime mitigating evidence presented in this case. See *supra*, at 20. While the prosecutor's comment in the present case is a greater departure from *Boyde*, it is not constitutionally significant. Like the *Boyde* Court, the California Supreme Court evaluated the relevant facts in their proper context.

The fact that all of the mitigating evidence in this case concerns Payton's conversion to Christianity is essential to understanding the California Supreme Court's decision. The *Boyde* Court encountered a parallel situation, where all of the defendant's mitigating evidence was not related to the crime. That fact resonated strongly in *Boyde* and also does so here. *Boyde*'s conclusion, that jurors would read the factor (k) instruction to turn the penalty hearing into a " 'virtual charade,' " 494 U. S., at 383 (quoting *California* v. *Brown*, 479 U. S. 538, 542 (1987)), applies with equal force to this case.

Although the trial court did not specifically instruct the jury that the prosecutor's statements were erroneous, there is no reason to believe that those statements empowered the jury to turn the trial into a charade. Defense counsel vigorously asserted the correct interpretation of factor (k). Arguing last, he told the jury that

> " 'section (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence. [¶] Any jury . . . that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.' The court did not permit the prosecutor to argue in rebuttal." *Payton*, 3 Cal. 4th, at 1072, 839 P. 2d, at 1049.

The trial court responded to the defendant's objection to the prosecutor's remarks by instructing the jury that counsel's argument was " 'not evidence' but 'argument' " which had to be placed in perspective. See *id.*, at 1071, 839 P. 2d, at 1048. Also, the prosecutor's arguments properly suggested how the jury could weigh the aggravating and mitigating evidence. See *id.*, at 1071-1072, 839 P. 2d, at 1049. In this context, it is highly unlikely that a reasonable juror would use the prosecutor's arguments as an excuse to ignore all of the defendant's case, the factor (k) instruction, the prosecutor's own statement about weighing the evidence, the defense counsel's arguments, and the trial court's instruction that arguments of counsel were only arguments.

At the very least, the California Supreme Court's conclusion that there was no constitutional error is reasonable. In *Lockyer* v. *Andrade*, 538 U. S. 63 (2003), the state court's decision was essentially in between two of this Court's precedents, one of which counseled affirmance of the sentence and the other supporting overturning the sentence on Eighth Amendment grounds. See *supra*, at 11-12. The state court's decision to follow the Supreme Court precedent upholding the sentence was reasonable under § 2254(d). See *supra*, at 11-12. The case for reasonableness is much stronger here than in *Andrade*.

Boyde is much closer to the facts of this case than any other Supreme Court opinion. In *Andrade*, if placed on a scale from 1 to 10, the case for affirmance, *Rummel* v. *Estelle*, 445 U. S. 263 (1980), would be a 1, and the case for reversal, *Solem* v.

Helm, 463 U. S. 277 (1983), would be a 10, then Andrade's case would be a 5. In the present case, if *Boyde* is a 1, and the closest contrary case, *Penry* v. *Lynaugh*, 492 U. S. 302 (2002) would be the 10, then Payton's case would be a 1.5. This case shares many similarities with *Boyde* and virtually none with *Penry*. There are no valid reasons for ignoring the close connection between the two.

The Ninth Circuit's decision is what the AEDPA was meant to prevent. The Eighth Amendment law governing mitigating evidence in capital cases is far from clear. For example, *Boyde* clarified an admittedly unclear standard for reviewing jury instructions that are claimed to improperly restrict the consideration of mitigating evidence. See 494 U. S., at 378. Many cases in this area are decided by 5-4 or split opinions. See, *e.g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (5-4). Lacking any definitive pronouncement from this Court concerning the facts presented in this case, the California Supreme Court did the best it could by analogizing the case to the closest Supreme Court opinion, *Boyde*. The Ninth Circuit's decision to call this unreasonable simply punishes a state court for analogous reasoning in order to impose its own view of the correct approach to the case. The AEDPA is designed to prevent mere disagreement with a state court from being the foundation of a grant of habeas corpus when the relevant Supreme Court precedent is ambiguous at best. See *Mitchell* v. *Esparza*, 540 U. S. 12, 124 S. Ct. 7, 11, 157 L. Ed. 2d 263, 270 (2003) (*per curiam*). The case for the reasonableness of the California Supreme Court opinion in this case is not merely strong, it is compelling.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation